

Exhibit A

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

**NP SUNSET LLC d/b/a
SUNSET STATION HOTEL & CASINO**

Employer

and

Case 28-RC-242249

**LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS
a/w UNITE HERE INTERNATIONAL UNION**

Petitioner

HEARING OFFICER'S REPORT ON OBJECTIONS

I. INTRODUCTION

On June 13, 2019,¹ an agent of Region 28 conducted an election among certain employees of NP Sunset LLC d/b/a Sunset Station Hotel & Casino (the Employer). A majority of employees casting ballots in the election voted for representation by the Local Joint Executive Board of Las Vegas a/w Unite Here International Union (the Petitioner).

On June 19, the Employer timely filed objections to conduct affecting the results of the election, claiming that the Petitioner, its agents, and its supporters, engaged in objectionable conduct unlawfully affecting the results of the election. Specifically, the Employer's Objections are as follows:

1. The [Petitioner] prepared and distributed a "We Are Sunset Station" booklet publishing the photographs of employees specifically identified as voters who allegedly intended to vote for the [Petitioner]. The [Petitioner's] distribution of the booklet and publication of employee photographs was intimidating, coercive, chilling, created an atmosphere of surveillance, fear and reprisal, was without any valid or legitimate purpose, rendering a free and fair election impossible.
2. The effect of the [Petitioner's] distribution of the "We Are Sunset Station" booklet, particularly in the context of other [Petitioner] election-day conduct, pre-election pressure, intimidation, harassment, and coercion, was to create the impression that the [Petitioner] was monitoring whether and how employees voted; created an impression of surveillance; created an

¹ All dates refer to 2019, unless otherwise noted.

atmosphere of fear and reprisal; intimidated, coerced and chilled employees generally; and intimidated, coerced and chilled employees who were not included in the booklet to stay away from the polls and not vote out of fear that “no” voters would be recognized and subjected to retaliation and bullying, rendering a free and fair election impossible.

3. The [Petitioner] misled bargaining unit employees, interfered with the conduct of a free and fair election, and suppressed voter turnout by falsely informing bargaining unit employees that they should not vote (rather than vote “no”), if they opposed the [Petitioner].

4. [Petitioner] supporters wearing pro-[Petitioner] clothing and buttons were stationed in a pathway leading to the polls, requiring that bargaining unit employees using this pathway pass by them in order to vote (notably, the Employer’s own surveillance cameras in this pathway were “hooded” (i.e., covered) out of recognition that many voters would go to the polls through this route). This conduct created an impression of surveillance; constituted prohibited electioneering; was intimidating, coercive and chilling; created an atmosphere of fear and reprisal; built on earlier pre-election [Petitioner] intimidation and harassment to dissuade “no” voters from going to the polls; rendering a free and fair election impossible.

5. To the extent any of the [Petitioner’s] as described above, is insufficient in isolation to constitute objectionable conduct, it must be viewed in the entire context of the [Petitioner’s] pre-election and election-day conduct, which in totality had the effect of intimidating, coercing and chilling voters, suppressing voter turnout, creating an impression of surveillance and an atmosphere of fear and reprisal, and instilling a fear of [Petitioner] retaliation and bullying, thereby making a free and fair election impossible.

After conducting the hearing and carefully reviewing all of the evidence as well as all of the arguments made by the parties, I recommend that the objections be overruled in their entirety because the Employer has not met its burden of establishing that the Petitioner engaged in objectionable conduct affecting the results of the election.

In the following sections, I recount the procedural history as well as the Employer’s operations and the background of the case. I then describe the record evidence relevant to the Employer’s Objections. I then state the Board standard applied to the Objections, the parties’ respective burdens, analyze the record evidence under the appropriate standards, and make my recommendations. The procedures for filing exceptions conclude my report.

After recounting the procedural history, I discuss the Employer’s operations and the background facts. Next, I discuss the parties’ burdens of proof and the Board standard for setting aside elections. Finally, I analyze the record evidence under the appropriate standard, make my recommendation for each objection, and set forth my conclusion and the appeal procedure.

II. PROCEDURAL HISTORY

Based on a petition filed on May 28, and pursuant to a Stipulated Election Agreement approved on June 5, an election by secret ballot was conducted on June 13, to determine whether a unit of employees of the Employer wished to be represented for purposes of collective bargaining by the Petitioner.

The voting unit consists of:

INCLUDED: All full-time and regular part-time banquet bartenders, banquet porters, banquet servers, bar/beverage porters, bartenders, bellpersons, beverage servers, buspersons, concession workers, concession workers/cooks, cooks, cooks (tipped), cook helpers, counter attendants, food servers, guest room attendants, hostpersons/cashiers, housepersons, kitchen runners, kitchen workers, lead counter attendants, pantry workers, porters, room runners, sprinters, status board operators, stove persons, team member dining room attendants, utility porters, and VIP bartenders employed by the Employer at its facility in Henderson, Nevada.

EXCLUDED: All other employees, front-desk employees, valet parkers, gaming employees (dealers, slot attendants, cage cashiers), inspectresses, engineering & maintenance employees, VIP attendants-pool grill, office clerical employees, confidential employees, guards, managers and supervisors as defined by the Act.

The Tally of Ballots served on the parties at the conclusion of the election shows the following:

Approximate number of eligible voters	588
Number of void ballots	2
Number of votes cast for Petitioner	360
Number of votes cast against participating labor organization(s)...	75
Number of valid votes counted	435
Number of challenged ballots	2
Number of valid votes counted plus challenged ballots	437

The challenges were not sufficient in number to affect the results of the election.

On June 19, the Employer timely filed objections. The Regional Director for Region 28 ordered that a hearing be conducted to give the parties an opportunity to present evidence regarding the objections. As the hearing officer designated to conduct the hearing and to recommend to the Regional Director whether the Employer's objections are warranted, I heard testimony and received into evidence relevant documents on July 11 and 12.

III. THE EMPLOYER'S OPERATIONS AND FACILITY

The Employer operates a hotel and casino in Henderson, Nevada (Employer's facility). As of the dates of the hearing, the Employer employed approximately 588 employees in the proposed bargaining unit in this matter. The employees, also referred to as team members, work in the Employer's Banquet, Concessions, and Room Service Departments, and other food service roles within the Employer's facility.

On the first floor of the Employer's facility, there is a hallway, which stretches between the doors to the public parking lot, to the back-of-the-house area. The hallway runs adjacent to the Grand Café. The Grand Café has both booths and tables, and the hallway is visible to patrons who are seated at the Grand Café.

Near the end of the first-floor hallway, close to the doors to the back of the house, there is an elevator which goes to the second floor. The elevator, referred to as the Executive Elevator, carries passengers between the first and second floors of the Employer's facility. The hallway also contains two surveillance cameras, one adjacent to the Executive Elevator, and one between the Grand Café and the doors out to the parking lot. There is a third security camera near the Executive Elevator landing on the second floor of the Employer's facility.

The Sunset Room is located on the second floor of the Employer's facility. To get to the Sunset Room from the Executive Elevator, an individual would take an immediate right turn out of the elevator, turn right again, and travel a short way down a hallway to the Sunset Room. There are other rooms and offices on the second floor, but the record does not reflect the function for which those spaces are used, or what parts of the Employer's operations might be conducted elsewhere on the second floor.

The back of the house area on the first floor is located behind the doors at the end of the first-floor hallway and contains a number of different employee-only spaces, including the Team Member Dining Room (TDR). Employees have meals in the TDR, and have access to that space during non-working time.

Employees are expected to park in the employee parking lot, which is accessible by a separate elevator, not the Executive Elevator, and which cannot be accessed from the first-floor hallway at issue in these objections. Some employees, however, choose to park in the public parking lot for patrons rather than in the employee parking lot.

IV. FACTUAL BACKGROUND

A. Events Preceding the June 13 Representation Election

In November 2018, the Petitioner opened up a satellite office near the Employer's facility, where the Petitioner employed nine paid organizers, all of whom were assigned to the organizing campaign. These organizers recruited Committee Leaders (also referred to as "committees"), Petitioner's employees who supported unionization and wanted to take an active

role in encouraging their coworkers to vote for Petitioner. (Tr. 188)² Committee Leaders wore buttons, displaying the Petitioner's signature "little people" and the words "Committee Leader". Also, they encouraged their coworkers to visit the Petitioner's satellite office and speak with one of the nine organizers about the Petitioner and the benefits of unionization.

The Petitioner distributed red T-Shirts and two different types of buttons to employees as part of its organizing campaign. The Petitioner distributed gold buttons emblazoned with the word "UNION" and white buttons imprinted with the Petitioner's signature "little people", and the words "COMMITTEE LEADER" in red letters. Petitioner routinely distributes red T-shirts to its members, their friends and family members, and members of the general public at its events, rallies, and marches. (Tr. 127, 130-31) These shirts often have different designs but are generally red and referenced the Petitioner. (Tr. 130) Petitioner distributes hundreds of these shirts at its events and conducts dozens of events throughout the year. (Tr. 130-31)

Committee Leaders did not have any formal training from the Petitioner and generally did not speak with employees on their own. (Tr. 188-91) Instead, Committee Leaders encouraged employees to visit the Petitioner's satellite office, escorted employees to the satellite office, or accompanied Petitioner's organizers on home visits for employees. (Tr. 188-89) None of the bargaining unit employees who testified in this matter could distinguish between the roles of employees who wore the gold "Union" buttons and the employees who wore the "Committee Leader" buttons at the Employer's facility.

From the beginning of the organizing campaign, Petitioner and the Committee Leaders encouraged employees to visit Petitioner's satellite office, located only a few minutes' drive from the Employer's facility, and meet with Petitioner's organizers. (Tr. 188-89) During those meetings, the organizers answered employees' questions, explained to them what the Employer likely would say and do in the course of the Employer's campaign, and asked if the employee would like to sign a union authorization card. (Tr. 194, 196) Specifically, the Petitioner's organizers spoke with employees about what the Petitioner observed during organizing campaigns at the Boulder, Palace, Green Valley Ranch, and Palms facilities, all of which are owned and operated by the Employer and which were the subjects of recent organizing campaigns by the Petitioner. (Tr. 196)

Moreover, Petitioner's organizers made an effort to get to know each individual employee who came to the satellite office, including their name, the length of employment, and the issues the employee deemed important. (Tr. 196) For employees who wanted Petitioner to serve as their exclusive bargaining representative, the organizers would request that the employee either sign an authorization card or update their union authorization card if the employee had previously signed a card. (Tr. 196)

² Reference to the transcript in this matter will be designated as "Tr." with the appropriate page citations. Reference to the exhibits of the Petitioner and the Employer will be designated as "PX" and "EX", respectively, with the appropriate number or numbers for those exhibits.

When speaking with employees who had signed authorization cards or otherwise expressed interest in voting for Petitioner, the organizers also discussed a “We Are Sunset Station” photo booklet that the Petitioner planned to produce and distribute prior to the election in this matter. (Tr. 197) Organizers showed employees the photo booklets that were produced for prior organizing campaigns at Boulder Station, Palace Station, Green Valley Ranch, and Palms. Each of those booklets included photos of employees, and the language “We Are Voting Yes.” (Tr. 197-98, PX 3, PX 4, PX 5, PX 6) While discussing the photo booklets with the employees, organizers explained to each employee that they planned to produce a similar photo book for the Employer’s facility, and asked if the employees would be interested in participating in such a book. (Tr. 202-05) If the employee wished to participate, the organizer would give them a waiver to fill out and sign and, after receiving the signed waiver, the organizer would take the employee’s photo or accept a personal photo that the employee wished to use for the photo booklet. (Tr. 205-07, PX 7) The organizers retained a copy of the employee’s waiver along with the employee’s photograph. (Tr. 206, PX 9).

Organizers obtained a total of 364 waivers and photos. (Tr. 208-09, PX 7) Shortly before publication of the booklet, one employee approached Petitioner and requested that the employee’s photo not appear in the book. Petitioner’s Organizing Director Delores Brown complied with that employee’s request; Brown did not include the employee’s photo in the booklet, and she removed the employee’s waiver and photo from the Petitioner’s files. (Tr. 208-10, EX 7, PX 8, PX 9)

In total, 363 employees’ photos appeared in the “We Are Sunset Station” booklet that was published and distributed to employees at the Employer’s facility in the weeks leading up to the June 13 election. (Tr. 208-10, EX 7, PX 8, PX 9) Petitioner retained media release waivers from all 363 employees who appear in the book, and honored the request of the aforementioned employee to be removed from the booklet prior to its publication. (Tr. 208-10, PX 9) Petitioner did not offer any kind of inducement for employees to have their photos taken, nor did the Petitioner threaten employees that they would face negative consequences should they refuse to have their photo taken.

A few days prior to the June 13 election, Food Server Rose Keene observed a copy of the “We Are Sunset Station” booklet in the TDR. (Tr. 90)

About June 11, the National Labor Relations Board Agent assigned to conduct the election in this matter held a pre-election conference, at which time the parties and their observers were instructed on the procedures for the June 13 election. The pre-election conference was held in the Sunset Room on the second floor of the Employer’s facility. In attendance were Employer’s counsel, Harriet Lipkin, Petitioner’s International Vice President Kevin Kline, Petitioner’s Director of Organizing Delores Brown, and the bargaining unit employees who served as observers for each party. During that pre-election conference, the Board Agent told observers that they could not speak to one another, and instructed the parties that they could not gather outside of the Sunset Room, located on the second floor of the Employer’s facility, where the election was going to be held. (Tr. 256) The Board Agent did not make any other statements to demarcate a non-electioneering zone within the Employer’s facility.

In the days leading up to the election, Director of Organizing Brown and other organizers met with Committee Leaders to discuss the boundaries within which employees should conduct themselves on the day of the election.(Tr. 165, 260) The organizers told Committee Leaders that they should think about where they would be likely to see the most employees on election day, and reminding employees to vote on, particularly those employees who the Petitioner had identified as supporters. Brown and the organizers emphasized to Committee Leaders that they should stay off of the second floor of the Employer's facility entirely, other than when they were voting or had some work related reason to be on that floor. (Tr. 260)

About June 12, the Employer and Petitioner met at the Employer's Fiesta Rancho facility for a pre-election conference for a different Board-supervised election. Following the pre-election conference, the Employer's representative, Harriet Lipkin, and Petitioner's International Vice President Kevin Kline discussed their positions on electioneering the parking lot, and in a walkway between the Employer's Fiesta Rancho facility and a trailer on that property. (Tr. 169-72) At no time did the Employer and Petitioner discuss possible no-electioneering zones involving the June 13 election at the Employer's facility.

B. Events Occurring During the June 13 Representation Election

The election at the Employer's facility on June 13 consisted of three voting sessions: 6:00 a.m. to 9:00 a.m.; 11:00 a.m. to 2:00 p.m.; and 4:00 p.m. to 7:00 p.m. Each session was conducted in the Sunset Room on the second floor of the Employer's facility.

Around 7:30 a.m., Food Server Catherine Rumble observed several employees wearing what she described as red union shirts throughout the Employer's facility. When she got off of the elevator from the employee parking area, Ms. Rumble observed a woman she recognized as an employee wearing a red shirt. (Tr. 65) The woman in the red shirt said good morning and reminded Ms. Rumble to go vote in the election that day. (Tr. 65) The woman did not ask for whom Ms. Rumble planned to vote, nor did she press Ms. Rumble to vote for the Petitioner (Tr. 65) When she passed through the first-floor hallway on her way to go vote between 7:30 and 8:00 a.m., Ms. Rumble observed about seven red-shirted employees in the hallway. (Tr. 64) Ms. Rumble did not pass through that hallway again on that date, and did not know whether or not the seven red-shirted employees were also on their way to go vote. (Tr. 74) Sometime before 8:00 a.m., Ms. Rumble went out to the smoking area and saw six individuals wearing red shirts in the smoking area. (Tr. 65) After leaving the smoking area, Ms. Rumble went to the TDR and remained there from 8:00 a.m. until 8:45 a.m. During that window of time, Ms. Rumble observed approximately 20 individuals in the TDR wearing red union shirts. (Tr. 65) Ms. Rumble recognized one of the employees as a member of her department who was scheduled to work later that day. (Tr. 65)

Between 11:30 a.m. and 12:30 p.m., Food Server Rose Keene passed through the first-floor hallway, spoke to a coworker about a personal matter, and entered the Executive Elevator. (Tr. 102-03) During that brief interlude, Ms. Keene observed several employees wearing red shirts, including the coworker with whom she conversed. (Tr. 94) Around 3:30 p.m., Ms. Keene

passed through the first-floor hallway a second time, and again entered the Executive Elevator, this time to serve as an observer for 4:00 p.m. to 7:00 p.m. voting session. (Tr. 95-96, 105) Ms. Keene did not observe any employees wearing red shirts in the first-floor hallway on this occasion. (Tr. 95-96, 105) Likewise, Ms. Keene did not observe employees wearing red shirts standing on the second floor near the Sunset Room.

Around 4:00 p.m., Marlene Irwin was working as a food server in the Grand Café. Ms. Irwin was serving station 6, which is on the far side of the Grand Café from the first-floor hallway and has a somewhat obstructed view of the first-floor hallway. Ms. Irwin observed between eight and 10 employees wearing red shirts, standing in the first-floor hallway, near the Executive Elevator. (Tr. 28) Ms. Irwin continued to serve guests for several hours after that, but noted that between 4:00 p.m. and 7:00 p.m. – the hours of the third voting session – each time she looked up she observed approximately eight to 10 employees wearing red shirts in the first-floor hallway near the Executive Elevator. (Tr. 48) In particular, Ms. Irwin observed one individual was in the first-floor hallway every time she looked up, but she did not recognize the other employees and did not recall if the remaining four to six employees were also the same each time she looked up. (Tr. 48-49) Ms. Irwin could not recall precisely the number of times she looked up during that period. (Tr. 49)

V. THE BURDEN OF PROOF AND THE BOARD'S LEGAL STANDARDS FOR SETTING ASIDE ELECTIONS

A. Burden of Proof for Representation Elections

It is well settled that “[r]epresentation elections are not lightly set aside,” and that “[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees.” *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Therefore, “the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one.” *Delta Brands, Inc.*, 344 NLRB 252, 253, (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). To prevail, the objecting party must establish facts raising a “reasonable doubt as to the fairness and validity of the election.” *Patient Care of Pennsylvania*, 360 NLRB 637 (2014), citing *Polymers, Inc.*, 174 NLRB 282, 282 (1969), *enfd.* 414 F.2d 999 (2d Cir. 1969), *cert. denied* 396 U.S. 1010 (1970). The objecting party’s burden encompasses every aspect of a *prima facie* case. *United Sanitation Services, Division of Sanitas Service Corp.*, 272 NLRB 119, 120 (1984). Moreover, to meet its burden, the objecting party must show that the conduct in question affected employees in the voting unit. *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling employer’s objection where no evidence that unit employees knew of the alleged coercive incident).

B. Legal Standard for Alleged Party Misconduct

In determining whether to set aside an election, the Board applies an objective test. The test is whether the conduct of a party has “the tendency to interfere with employees’ freedom of choice.” *Cambridge Tool Pearson Education, Inc.*, 316 NLRB 716 (1995). Thus, under the Board’s test, the issue is not whether a party’s conduct in fact coerced employees, but whether the party’s misconduct reasonably tended to interfere with the employees’ free and uncoerced

choice in the election. *Baja's Place*, 268 NLRB 868 (1984). See also, *Pearson Education, Inc.*, 336 NLRB 979, 983 (2001), citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970).

In assessing whether an election should be set aside, the Board considers all the facts and circumstances to determine “whether the atmosphere was so tainted as to warrant such action.” *Madison Square Garden*, 350 NLRB 117, 119 (2007), citing *General Shoe Corp.*, 77 NLRB 124 (1948), *enfd.* 192 F.2d 504 (6th Cir. 1951), *cert. denied* 343 U.S. 904 (1952). Some of the factors considered by the Board in determining whether a party’s conduct has the tendency to interfere with employee free choice, include: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among employees in the voting unit; (3) the number of employees in the voting unit who were subjected to the misconduct; (4) the proximity of the misconduct to the date of the election; (5) the degree to which the misconduct persists in the minds of employees in the voting unit; (6) the extent of dissemination of the misconduct to employees who were not subjected to the misconduct but who are in the voting unit; (7) the effect (if any) of any misconduct by the non-objecting party to cancel out the effects of the misconduct alleged in the objection; (8) the closeness of the vote; and (9) the degree to which the misconduct can be attributed to the party against whom objections are filed. *Taylor Wharton Division*, 336 NLRB 157, 158 (2001), citing *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

C. Legal Standard for Alleged Third-Party Misconduct

Where misconduct is attributable to third parties, the Board will overturn an election only if the misconduct is “so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” *Westwood Horizons Hotel*, 270 NLRB. 802, 803 (1984).

VI. THE EMPLOYER’S FIRST AND SECOND OBJECTIONS

A. Legal Standard for Parties’ Publication and Distribution of Propaganda Identifying Employee Supporters

The Board has long taken the position that it will not set aside an election solely on the basis of misleading campaign statements. *Midland National Life Insurance Co.*, 263 NLRB 127 (1982). When publishing propaganda that features photos of employees or signatures which purport to belong to employees, the Board looks at whether the publishing party has used forged documents and whether employees are able to identify the documents as the propaganda that they are. *Id.*, at 133. See also, *Somerset Valley Rehabilitation & Nursing Center*, 357 NLRB 736 (2011); *BFI Waste Services*, 343 NLRB 254 (2004); *Champaign Residential Services*, 325 NLRB 687 (1998). When rejecting post-election objections based on these types of literature, the Board has consistently taken the position that employees can “easily identify [it] as campaign propaganda.” *Somerset Valley*, 357 NLRB at 736.

B. Legal Standard for Parties Publication of Employee Photos

The Board distinguishes between the publication of photos of employees taken with the employees’ knowledge and consent for the express purpose of publication in campaign

propaganda, and those taken without employees' knowledge while employees are engaged in Section 7 activities. See, *Durham Sch. Servs., Lp & Int'l Bhd. of Teamsters, Local 991*, 360 NLRB 851, 851–52 (2014) (rejecting an employer's objections to a union's distribution of a pamphlet reading "On February 22, 2013 WE'RE VOTING YES For Teamsters Local Union 991! We are voting 'Teamsters YES!' for a better future at Durham!" which featured photos of bargaining unit employees); *Somerset Valley*, 357 NLRB 736. But see, *Randell Warehouse of Arizona, Inc.*, 347 NLRB 591, 594 (2006) (setting aside the results of a Board election on the basis that the union had engaged in objectionable conduct when it photographed employees responding to the union's attempts to provide employees with literature); *Waco, Inc.*, 273 NLRB 746, 747 (1984); *F. W. Woolworth*, 310 NLRB 1197 (1993)

Under current Board law, if the party responsible for the publication of a propaganda booklet identifying employees can satisfy the *Midland* standard or the similar Sixth Circuit *Van Dorn* standard, then the publication of the photos is sufficient. However, in recent years dissenting Board members have proposed an additional requirement: that the publishing party affirmatively establish that they have received express permission from the identified employees to disclose the manner in which those employees intend to vote. See, *Durham Sch. Servs., Lp & Int'l Bhd. of Teamsters, Local 991*, 360 NLRB 851, 853 (2014); *In Re Enter. Leasing Co.-Se., LLC*, 357 NLRB 1799, 1801–02 (2011). This proposed approach would also require that any such permission be granted willingly, knowingly, and freely, with clear information about the precise content that the publishing party planned to include in the final document. *Somerset Valley*, 357 NLRB at 738.

C. The "We Are Sunset Station" Booklet Was Clearly Identifiable to Employees as Partisan Propaganda

In this case, the Petitioner distributed a booklet which contained 363 photos of employees who had declared their support for the Petitioner. The cover of the booklet read, "We Are Sunset Station" in both English and Spanish, and showed the Petitioner's signature "little people" graphic. The inside cover of the booklet listed the dates and times of the election. Each subsequent page of the book contained approximately 30 thumbnail photos of individual employees, and the bottom of each page contained the text "We Are Voting Yes!" Also, the booklet included a sample ballot and explained how employees should fill in the ballot if they wished to vote for Petitioner. The back inside cover of the booklet specifically identified the Culinary Workers Union Local 226 and Unite Here! Bartenders Local #165³ as the authors of the booklet, and identified the physical and internet locations at which the employees could get further information about the Petitioner.

There is no factual dispute as to the legitimacy of the photographs included in the booklet, nor is there any dispute with respect to employees' ability to identify the Petitioner as the author of these booklets. The Employer has not raised any factual questions about the authenticity of the photographs contained in the "We Are Sunset Station" booklet. Indeed, the witnesses who testified about the booklet in this matter recognized employees whose photos

³ Together, Culinary Union Local 226 and Unite Here! Bartenders Local #165 comprise the Local Joint Executive Board of Las Vegas.

were contained in the book, and acknowledged that in some cases they had spoken directly with the employees about their participation in the booklet.

Consequently, I find that the Employer, who bears the burden in this matter, has failed to establish that the Petitioner's "We Are Sunset Station" booklet is so fraudulent or misleading that employees could not identify it as the propaganda that it was.

**D. Employees' Consent to Participate in the "We Are Sunset Station"
Booklet was Given Knowingly, Willingly, and Freely**

Even under the higher standard proposed by Member Hayes and Member Miscimara in their dissenting opinions in *Durham*, supra, *Enterprise Leasing*, supra, and *Somerset Valley*, supra, Petitioner's publication and distribution of the "We Are Sunset Station" photo booklet does not rise to the level of objectionable conduct. The records reflects the following: the Petitioner's organizers met with each individual pictured in the booklet; spoke to them about what the Petitioner could do for them; what the employee would like to see from the Petitioner; and, if the employee agreed to sign a card, the Petitioner's organizers showed the employee copies of four photo booklets associated with organizing campaigns at the Employer's Green Valley Ranch, Boulder Station, Palace Station, and Palms facilities. Notably, the layout of the Green Valley Ranch, Boulder Station, Palace Station, and Palms booklets were identical to the "We Are Sunset Station" booklet: (1) they featured the language "We Are Voting Yes!", (2) they featured thumbnail size photos of employees who had declared their support for Petitioner, and (3) the photos were arranged in six rows of five photos each.

Only after showing the employees these four booklets did the Petitioner ask each employee if they would be interested in participating in the "We Are Sunset Station" photo booklet, which the organizers told employees would be published and distributed shortly before the election. If employees agreed to participate in the booklet, then the organizers asked the employee to sign a Media Release Form. The Media Release Form specified that the employee was giving the Petitioner permission to take his/her picture and to publish that picture in a "We are Voting YES" booklet, which would be distributed to other employees during a Board-supervised election at the facility where the employee regularly works. The waiver, printed in both English and Spanish, was signed by 364 employees,⁴ states clearly the precise manner in which the photos will be used. While not presently required by Board law, the record shows that Petitioner maintained waivers that would be sufficient to satisfy the requirements of Members Miscimara and Hayes proposed standard, requiring fully informed consent to participation in this type of publication.

For all of these reasons, I recommend that Objections 1 and 2 be overruled.

⁴ While 364 employees signed waivers, one employee later requested that the Petitioner remove her photo from the booklet, and the Petitioner honored that request, resulting in a total of 363 photos and 363 waivers.

VII. THE EMPLOYER'S THIRD OBJECTION

The Employer failed to present any evidence at hearing in support of this objection, which alleges that the Petitioner, its agents, or its supporters, made statements to bargaining unit employees that they “should not vote (rather than vote “no”), if they opposed the [Petitioner].” Consequently, I find that the Employer has not met its burden to establish that objectionable statements were made.

For all of these reasons, I recommend that Objection 3 be overruled.

VIII. AGENCY STATUS OF COMMITTEE LEADERS AND UNION SUPPORTERS

Before I address and discuss the Employer's Fourth Objection, *infra* Section IX, it is necessary that I review the legal standards regarding third party agency status and special agency status, and then analyze those standards to the facts in this matter.

A. Legal Standard for Third Party Agency Status

The burden of proving an agency relationship rests with the party asserting its existence, both as to the existence of the relationship and as to the nature and extent of the agent's authority. *Millard Processing Services*, 304 NLRB 770, 771 (1991); *Sunset Line &Twine Co.*, 79 NLRB 1487, 1508 (1948). The agency relationship must be established with regard to the specific conduct that is alleged to be unlawful. *Pan-Oston Co.*, 336 NLRB 305, 306 (2001). An individual can be a party's agent if the individual has either actual or apparent authority to act on behalf of the party.

The Board applies common law principles of agency in determining whether an alleged agent is acting with apparent authority on behalf of a party when the alleged agent makes a particular statement or takes a particular action. *Cooper Industries*, 328 NLRB 145 (1999). Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question. *Millard Precision Services*, 304 NLRB 770, 771 (1991), citing Restatement 2d, Agency, 27 (1958, Comment)). Two conditions must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. *Id.* at Section 8.

Agency is not established merely on the basis that employees are engaged in “vocal and active Petitioner support.” *United Builders Supply Co.*, 287 NLRB 1364, 1365 (1988); *see also Tuf-Flex Glass v. NLRB*, 715 F.2d 291, 296 (7th Cir. 1983). Attending organizing meetings or soliciting cards on behalf of a union do not, standing alone, render employees agents of the union. *Health Care and Retirement Corporation of America v. NLRB*, 255 F.3d 276 (6th Cir. 2000). Employee members of a union's in-plant organizing committee are not, simply by virtue of such membership, agents of the union. *Advance Products. Corp.*, 304 NLRB 436 (1991); *Health Care and Retirement Corporation of America*, *supra*.

B. Legal Standard for Special Agency Status

In the absence of extraordinary circumstances, the Board has held that when a union makes authorization cards available to employees for the purpose of soliciting authorization cards from their coworkers, those employees who solicit authorization cards should be treated as special agents of the union for the purpose of assessing the impact of statements made about union fee waivers or other union policies that are made in the course of soliciting authorization cards. *Davlan Eng'g*, 283 NLRB 803, 804–05 (1987). Agency law principles generally define an individual as a special agent when they have actual authority to complete a single transaction or specific series of transactions. Restatement, 2d, *Agency* § 3(2) (1958).

C. Committee Leaders Were Not Agents of the Petitioner

In determining whether employee organizers or committee leaders are agents of a union, the Board looks at whether the employee organizers or committee leaders have been the union's only mouthpiece for purposes of communication with the employees. For example, in *Bristol Textile Co.*, 277 NLRB 1367 (1986), the Board found that an employee was an agent of the union because he served as the union's sole conduit to employees at the plant. Similarly, the Board found in *Bio-Medical Applications of Puerto Rico, Inc.*, 269 NLRB 827 (1984) that an employee who was directed by a union officer to stay in the waiting area near the poles was a union representative, and that his conduct in the waiting area constituted objectionable electioneering.

Here, the record shows that the Petitioner employed a director of organizing and seven additional organizers, all of whom were specifically responsible for speaking with employees about the Petitioner and what it could offer to employees, soliciting authorization cards from employees, and soliciting employee participation in the Petitioner's "We Are Sunset Station" booklet. Committee Leaders did not have such responsibilities or authority. The Petitioner's care in ensuring that communications with and solicitations of potential bargaining unit employees were undertaken by paid organizers rather than Committee Leaders precludes any manifestation from the Petitioner to the employees that the Committee Leaders had authority to speak for the Petitioner or otherwise act on its behalf. In fact, there is no evidence that Committee Leaders were even perceived by other employees as having any authority to speak on behalf of the Petitioner.⁵

Committee Leaders did not perform any of the following duties: run meetings, communicate information about Petitioner and its functions directly to employees, solicit authorization cards, seek employee participation in Petitioner's organizing campaign, or direct election related activities on Petitioner's behalf. In this instance, Committee Leaders were merely outspoken supporters of the Petitioner; they actively encouraged other employees to vote for the Petitioner in the June 13 election.

⁵ While both Ms. Rumble and Ms. Keene testified that they recognized the Committee Leader buttons and that they understood that the buttons signified some kind of increased involvement with or support for the Petitioner, neither knew precisely what the button represented.

Consequently, I conclude that the Employer, who bears the burden of proof in this matter, has failed to establish that employees could reasonably conclude that the committee leaders were acting on behalf of the Petitioner when they engaged in the conduct that the Employer has alleged is objectionable. I find that the Petitioner was not responsible for any conduct by its committee leaders or any pro-Petitioner employees within the scope of these objections. *Crestwood Hospitals, Inc.*, 316 NLRB 1057, 1057 (1995). Accordingly, the standard I will apply for the objections involving the committee leaders, as well as for the pro-Petitioner employees, will be the standard applied to third parties. *Cornell Forge Co.*, 339 NLRB 733 (2003).

D. Committee Leaders Were Not Special Agents of Petitioner on June 13

While there was some testimony that Organizing Director Delores Brown and Petitioner's other organizers spoke with the Committee Leaders about what they could do and where within the Employer's facility they could approach other employees and remind them to vote, there is no evidence that the Committee Leaders or any other employees for that matter were given specific authority to speak or act on Petitioner's behalf in order to ensure that employees voted or voted in a particular manner. Brown and the organizers she oversaw articulated boundaries for Committee Leaders, directing them not to engage in any electioneering conduct on the second floor of the Employer's facility, where the Sunset room was located.

Furthermore, Petitioner's paid organizers encouraged the Committee Leaders to think about where they could speak with employees and encourage them to vote, just as they would on any other day, without engaging in any type of electioneering behavior on the second floor of the Employer's facility. Placing these types of boundaries did not impute any type of authority to the Committee Leaders, even for the limited purpose of conducting a single specific transaction.

E. The Red-Shirted Union Supporters Were Not Agents of the Petitioner

There is no evidence to establish the identities of Red-Shirted Union supporters standing in the first-floor hallway on June 13. These individuals were identified by their red union shirts, and were recognizable as bargaining unit employees who were employed at the Employer's facility. The Petitioner's red t-shirts are so ubiquitous that they alone do not communicate any type of specific role or direct affiliation with the Petitioner.

IX. THE EMPLOYER'S FOURTH OBJECTION

"It is the province of the Board to safeguard its elections from conduct which inhibits the free choice of the voters, and the Board is especially zealous in preventing intrusions upon the actual conduct of its elections." *Claussen Baking Co.*, 134 NLRB 111, 112 (1961); see also *Star Expansion Industries Corp.*, 170 NLRB 364, 365 (1968). "In furtherance of this responsibility, the Board prohibits electioneering at or near the polls." *Claussen*, 134 NLRB at 112; *Star*, supra; cf. *Milchem, Inc.*, 170 NLRB 362 (1968) ("The final minutes before an employee casts his vote should be his own, as free from interference as possible.").

At the outset, I find that the Employer failed to meet its burden to provide specific detailed testimony in support of its allegation that the red-shirted Petitioner supporters engaged in objectionable electioneering on June 13. Rather, as summarized above, each of the witnesses testified in a conclusory fashion that the mere presence of individuals in the first-floor hallway during polling times was somehow intimidating and coercive surveillance and electioneering. None of the witnesses provided additional details to bolster these allegations.

In evaluating electioneering by nonparties, the standard is “whether the conduct at issue so substantially impaired the employees’ exercise of free choice as to require that the election be set aside.” *Rheem Mfg. Co.*, 309 NLRB 459, 463 (1992); *Southeastern Mills*, 227 NLRB 57, 58 (1976). In determining whether an election should be set aside for third party electioneering, the Board considers the closeness of the election as an important factor. See, e.g., *Pepsi-Cola Bottling Co.*, 291 NLRB 578, 579 (1988).

The evidence presented shows that at different times on the day of the election, team members wearing red union t-shirts were present in the hallway between the public parking area and back of the house area, adjacent to the Grand Café. The Executive Elevator is also located in that hallway. The three bargaining unit employees who testified in this proceeding identified the Executive Elevator as one of several routes that employees might take to go vote, in the Sunset Room on the second floor. Ms. Irwin, Ms. Rumble, and Ms. Keen all testified that there were a large number of individuals in red t-shirts which they associated with the Petitioner throughout the Employer’s facility on June 13.

Considering the incidents that Ms. Irwin, Ms. Rumble, and Ms. Keene observed cumulatively, I find that the Employer has failed to establish that (1) any person or persons conversed with or made statements to any employees in the first-floor hallway beyond cursory greetings and small talk unrelated to the election; (2) any specific person was present in the first-floor hallway for more than a brief period of time; (3) that any individual could monitor voters’ arrival at the polling session from the first-floor hallway; (4) that any individual engaged in any conduct that would lead a reasonable voter to conclude that their arrival at the polling session was being monitored; (5) that any individual engaged in any acts of coercion; or (6) that any individual violated the Board Agent’s instruction to refrain from loitering or engaging in electioneering in the waiting area outside the Sunset Room.

Moreover, even if committee leaders and pro-Petitioner employees were in the first-floor hallway - on an entirely separate floor from the polling location - greeting employees and encouraging them to go vote, such conduct cannot reasonably be considered coercive and hardly creates an “atmosphere of fear and reprisal rendering a fair election impossible.” *Westwood Horizons Hotel*, 270 NLRB at 803. Even if the red-shirted employees were established as Petitioner’s agents, the Employer would still have failed to meet its burden for Objection 4 because there is insufficient evidence that any of the individuals located in the first-floor hallway engaged in coercive or objectionable conduct. *C&G Heating & Air Conditioning, Inc.*, 356 NLRB No. 133 (2011).

For all of these reasons, I recommend that Objection 4 be overruled.

X. THE EMPLOYER'S FIFTH OBJECTION

The Employer's final objection argues that even if none of the Employer's first four objections, when evaluated individually, are not sufficient to set aside the election, the Petitioner's conduct when taken together created an atmosphere of fear and reprisal so coercive as to render free choice impossible.

Historically, the bar for setting aside the results of a Board supervised election has been set very high, and that line of analysis is generally applied in cases involving threats made by supporters of one or both parties – threats which when taken together are no longer just tough talk but instead create a coercive atmosphere that renders free choice impossible. *N.L.R.B. v. Van Gorp Corp.*, 615 F.2d 759, 763–64 (8th Cir. 1980) (holding that, when evaluated cumulatively, a series of threatening statements made by various union supporters, which when evaluated individually amounted to no more than tough talk, created an atmosphere of fear and reprisal that rendered free choice impossible).

I find that the Employer has failed to meet its burden to establish that any threatening conduct took place in this case. The record does not reflect any evidence of activities that could be deemed to amount to coercion or surveillance of voters during the election period, nor does it reflect evidence of any conduct by the Petitioner, its agents, or its supporters, which could be deemed to have affected the outcome of the election.

For these reasons, I recommend that Objection 5 be overruled.

XI. CONCLUSION

I recommend that the Employer's objections be overruled in their entirety. The Employer has failed to establish that the Petitioner engaged in objectionable conduct affecting the results of the election. Thus, there is insufficient evidence to set aside the election held on June 13. Therefore, I recommend that an appropriate certification issue.

XII. APPEAL PROCEDURE

Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region 28 by August 20, 2019. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Exceptions may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the exceptions should be addressed to the Regional Director, National Labor Relations Board, 2600 North Central Avenue, Suite 1400, Phoenix, Arizona 85004.

Pursuant to Sections 102.111 – 102.114 of the Board's Rules, exceptions and any supporting brief must be received by the Regional Director by close of business 4:45 p.m. on the

due date. If E-Filed, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date.

Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Dated at Albuquerque, New Mexico, this 6th day of August 2019.

/s/ **Katherine E. Leung**

Katherine E. Leung, Hearing Officer
National Labor Relations Board – Region 28
421 Gold Avenue SW
PO Box 244
Albuquerque, NM 87103
Telephone (505) 313-7226
Facsimile (505) 206-5695
E-mail: katherine.leung@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that the **HEARING OFFICER'S REPORT ON OBJECTIONS** in *NP SUNSET LLC d/b/a SUNSET STATION HOTEL & CASINO*, Case 28-RC-242249, was served via E-Gov, E-Filing, and E-Mail, on this 6th day of August 2019, on the following:

Via E-Gov, E-Filing:

Cornele A. Overstreet, Regional Director
National Labor Relations Board
Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3099

Via E-Mail:

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Exhibit B

**NP SUNSET LLC D/B/A SUNSET STATION
HOTEL & CASINO**

and

**LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS
AFFILIATED WITH UNITE HERE
INTERNATIONAL UNION**

Case No. 28-RC-242249

EMPLOYER'S OBJECTIONS TO ELECTION

Pursuant to Rule 102.69 of the Rules and Regulations of the National Labor Relations Board, NP Sunset LLC d/b/a Sunset Station Hotel & Casino ("Employer") hereby presents the following objections to the conduct of the representation election held on June 13, 2019.

1. The Local Joint Executive Board of Las Vegas affiliated with UNITE HERE International Union ("Union") prepared and distributed a "We Are Sunset Station" booklet publishing the photographs of employees specifically identified as voters who allegedly intended to vote for the Union. The Union's distribution of the booklet and publication of employee photographs was intimidating, coercive, chilling, created an atmosphere of surveillance, fear and reprisal, was without any valid or legitimate purpose, rendering a free and fair election impossible.

2. The effect of the Union's distribution of the "We Are Sunset Station" booklet, particularly in the context of other Union election-day conduct, pre-election pressure, intimidation, harassment, and coercion, was to create the impression that the Union was monitoring whether and how employees voted; created an impression of surveillance; created an atmosphere of fear and reprisal; intimidated, coerced and chilled employees generally; and intimidated, coerced and chilled employees who were not included in the booklet to stay away

from the polls and not vote out of fear that “no” voters would be recognized and subjected to retaliation and bullying, rendering a free and fair election impossible.

3. The Union misled bargaining unit employees, interfered with the conduct of a free and fair election, and suppressed voter turnout by falsely informing bargaining unit employees that they should not vote (rather than vote “no”), if they opposed the Union.

4. Union supporters wearing pro-Union clothing and buttons were stationed in a pathway leading to the polls, requiring that bargaining unit employees using this pathway pass by them in order to vote (notably, the Employer’s own surveillance cameras in this pathway were “hooded” (*i.e.*, covered) out of recognition that many voters would go to the polls through this route). This conduct created an impression of surveillance; constituted prohibited electioneering; was intimidating, coercive and chilling; created an atmosphere of fear and reprisal; built on earlier pre-election Union intimidation and harassment to dissuade “no” voters from going to the polls; rendering a free and fair election impossible.

5. To the extent any of the Union’s conduct, as described above, is insufficient in isolation to constitute objectionable conduct, it must be viewed in the entire context of the Union’s pre-election and election-day conduct, which in totality had the effect of intimidating, coercing and chilling voters, suppressing voter turnout, creating an impression of surveillance and an atmosphere of fear and reprisal, and instilling a fear of Union retaliation and bullying, thereby making a free and fair election impossible.

Respectfully Submitted,

Date: June 19, 2019

/s/ Harriet Lipkin

Harriet Lipkin
DLA Piper LLP (US)
500 Eighth Street NW
Washington, D.C. 20004

Kevin Harlow
DLA Piper LLP (US)
401 B Street, Suite 1700
San Diego, CA 92101

Attorneys for Employer,
NP Sunset LLC d/b/a
Sunset Station Hotel & Casino

CERTIFICATE OF SERVICE

I hereby certify this 19th day of June, 2019, that a copy of the Employer's Objections was electronically served on:

Cornele A. Overstreet
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Paige Brinkley
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Kevin Kline
Local Joint Executive Board of Las Vegas
a/w UNITE HERE International Union
1630 S. Commerce Street
Las Vegas, NV 89102
kkline@unitehere.org

/s/ Kevin Harlow
An Employee of DLA Piper LLP (US)

Exhibit C

1/1


Building Map 2018-12-18.pdf - Adobe Acrobat Reader DC

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Grand Cafe

Surv Cam

Hallway

Exec Elev

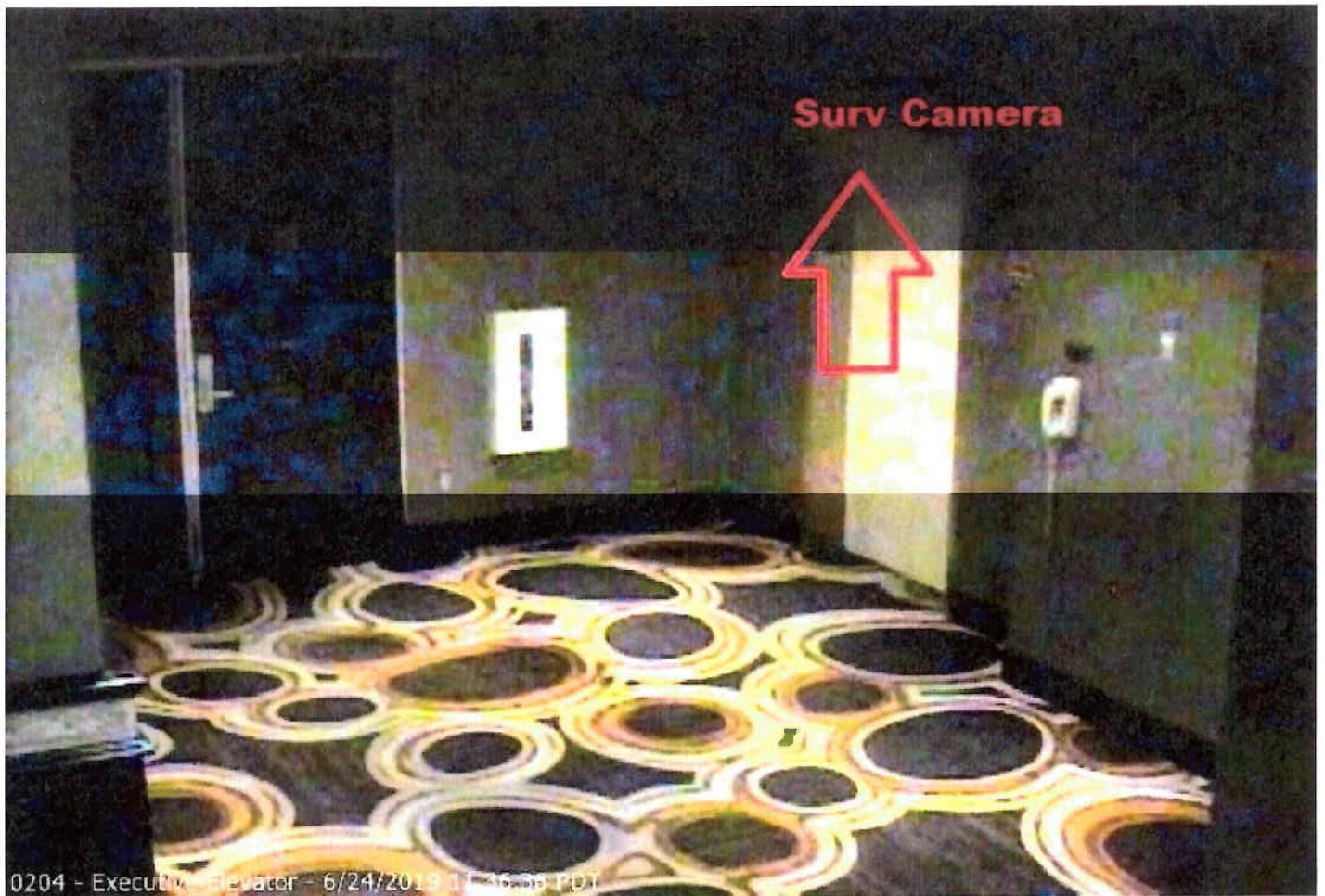
Surv Cam

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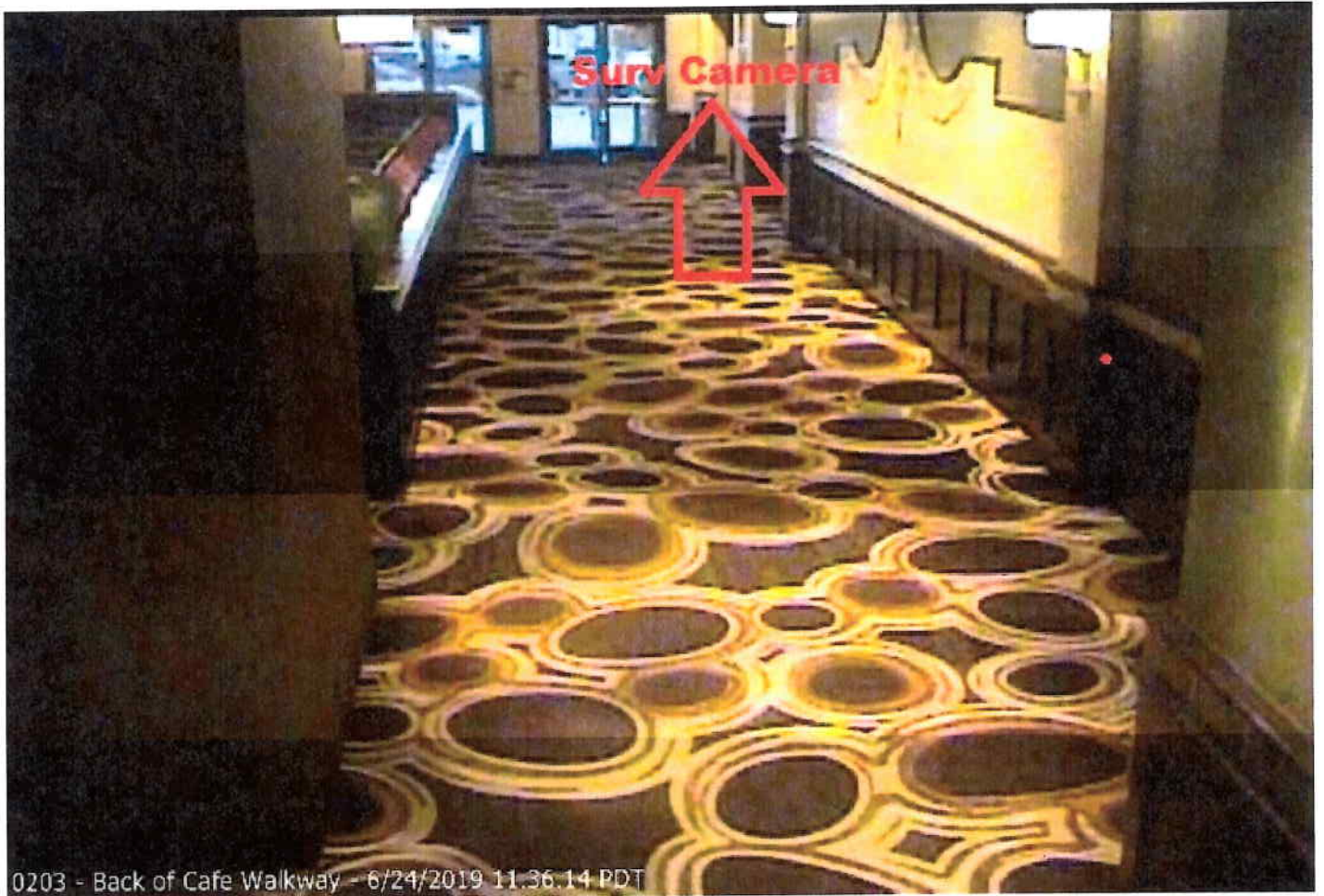
EX 2



EX3



EX 4



EX 7

WE ARE SUNSET STATION!



¡SOMOS SUNSET STATION!

We Are Voting Yes!

¡Vamos A Votar Sí!

We Are Voting Yes!

¡Vamos A Votar Sí!

Thursday, June 13
jueves, 13 de junio

6 am to 9 am

11 am to 2 pm

4 pm to 7 pm

Sunset Room



We Are Voting Yes!



¡Vamos A Votar Sí!

We Are Voting Yes!



¡Vamos A Votar Sí!

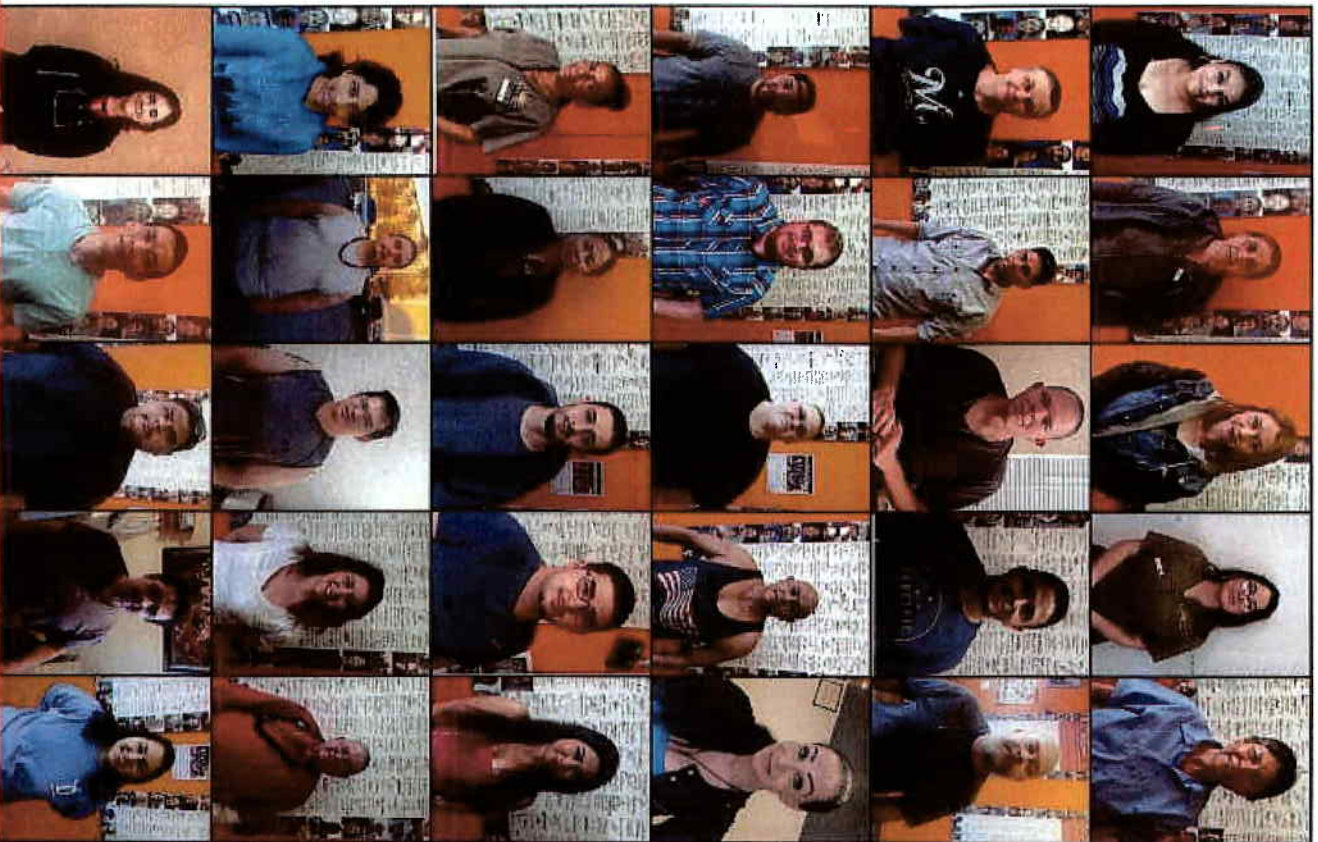


We Are Voting Yes!



!Vamos A Votar Si!

We Are Voting Yes!



¡Vamos A Votar Sí!



We Are Voting Yes!



¡Vamos A Votar Sí!

We Are Voting Yes!



¡Vamos A Votar Sí!

We Are Voting Yes!

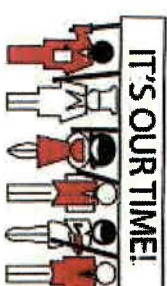
WE ARE SUNSET STATION SOMOS SUNSET STATION

This is a sample of what
the ballot will look like:



Este es un ejemplo de cómo
se verá la boleta electoral:

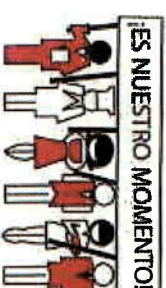
¡Vamos A Votar Sí!



How to vote "YES" for our union:

Make an "X" in the "YES" box on the left
DO NOT sign the ballot
DO NOT write or make any other marks on the ballot
Fold the ballot and place it in the ballot box

If you mark the wrong box or make any other marks on the ballot, give the ballot back to the NLRB agent and ask for a new ballot.



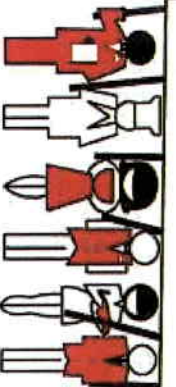
Cómo votar "Sí" por nuestra unión:

Ponga una "X" en el cuadro que dice "Sí" al lado izquierdo
NO ponga su firma en la papeleta
NO escriba ni haga otras marcas en la papeleta
Doble la papeleta y métala en la urna electoral

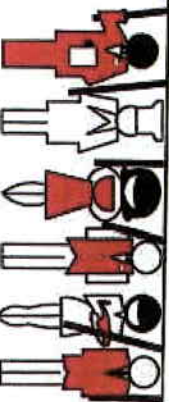
Si marca el cuadro equivocado o hace alguna marca en la papeleta, regresele la papeleta al agente del NLRB y pida otra.

We Are Voting Yes!

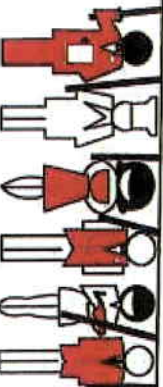
IT'S OUR TIME!



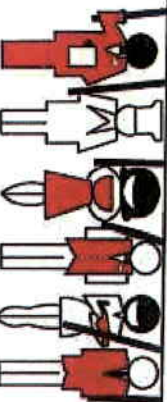
¡ES NUESTRO MOMENTO!



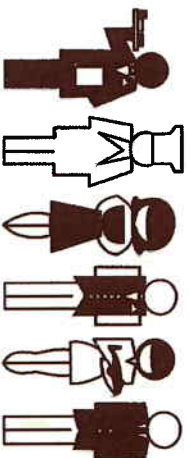
IT'S OUR TIME!



¡ES NUESTRO MOMENTO!



¡Vamos A Votar Sí!



**CULINARY
WORKERS UNION
LOCAL 226**



Culinary Workers Union Local 226
1630 South Commerce Street
Las Vegas, Nevada 89102

www.CulinaryUnion226.org
Facebook.com/Culinary226
@Culinary226



We Are Voting Yes!

**WE ARE
SUNSET
STATION!**

IT'S OUR TIME!



**¡SOMOS
SUNSET
STATION!**

Exhibit D

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

**NP SUNSET LLC D/B/A SUNSET STATION
HOTEL & CASINO**

Employer

and

Case 28-RC-242249

**LOCAL JOINT EXECUTIVE BOARD OF
LAS VEGAS A/W UNITE HERE
INTERNATIONAL UNION**

Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Stipulated Election Agreement, an election was conducted on Thursday, June 13, 2019, in a unit of all full-time and regular part-time banquet bartenders, banquet porters, banquet servers, bar/beverage porters, bartenders, bellpersons, beverage servers, buspersons, concession workers, concession workers/cooks, cooks, cooks (tipped), cook helpers, counter attendants, food servers, guest room attendants, hostpersons/cashiers, housepersons, kitchen runners, kitchen workers, lead counter attendants, pantry workers, porters, room runners, sprinters, status board operators, stove persons, team member dining room attendants, utility porters, and VIP bartenders employed by NP Sunset LLC d/b/a Sunset Station Hotel & Casino (the Employer); excluding all other employees, front-desk employees, valet parkers, gaming employees (dealers, slot attendants, cage cashiers), inspectresses, engineering & maintenance employees, VIP attendants-pool grill, office clerical employees, confidential employees, guards, managers and supervisors as defined by the Act. The tally of ballots showed that of the approximately 588 eligible voters, 360 cast ballots for the Local Joint Executive Board of Las Vegas a/w Unite Here International Union (the Petitioner), and 75 cast ballots against representation. There were two challenged ballots. Therefore, Petitioner received a majority of the votes.

On June 19, 2019, the Employer timely filed five objections. A hearing was conducted on July 11 and 12, 2019. On August 6, 2019, the Hearing Officer issued a report in which she recommended overruling the Employer's objections in their entirety. On August 20, 2019, the Employer filed exceptions, and a supporting brief, to the Hearing Officer's recommendations.

On September 3, 2019, the Petitioner filed an answering brief to the Employer's supporting brief.¹

The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. I have considered the evidence and the arguments presented by the parties and, as discussed below, I agree with the Hearing Officer that all the Employer's objections should be overruled.² Accordingly, I am issuing a Certification of Representative.

I. THE OBJECTIONS

Objection 1: The [Petitioner] prepared and distributed a "We Are Sunset Station" booklet publishing the photographs of employees specifically identified as voters who allegedly intended to vote for the [Petitioner]. The [Petitioner's] distribution of the booklet and publication of employee photographs was intimidating, coercive, chilling, created an atmosphere of surveillance, fear and reprisal, was without any valid or legitimate purpose, rendering a free and fair election impossible.

For the reasons set forth in the Hearing Officer's report, I agree with her recommendation to overrule Objection 1.

In Objection 1, the Employer speculates that employees would feel obligated to follow through on their stated intention to vote "Yes" by consenting to be included in the "We Are Sunset Station" booklet. The Employer cites to *National Labor Relations Board v. Savair Manufacturing Company*, 414 U.S. 270, 277 (1973), where the Supreme Court articulated several reasons why a union cannot offer to waive initiation fees for employees that sign a recognition slip. Here, *Savair* is distinguishable from the facts of this case because that case related to employees feeling obligated to support the union after the union waived initiation fees for them. Here, no fees of any sort were waived for employees. Rather, the Petitioner simply asked employees if they wanted to be included in the "We Are Sunset Station" booklet, after showing them examples of similar booklets used in other campaigns, and after obtaining their expressed written consent to include them in the booklet. Indeed, employees were permitted to rescind their consent to be included in the booklet if they so chose, and the record reflects that

¹ On September 17, 2019, the Employer filed a reply brief to the Petitioner's answering brief. The Petitioner subsequently filed a motion to strike the Employer's reply brief, and the Employer filed an opposition to that motion. Pursuant to the Board's Rules and Regulations, Section 102.69(c)(1)(iii), the parties are entitled to file a brief in support of exceptions and an answering brief. This section of the Board's Rules and Regulations makes no mention of parties being entitled to file reply briefs. Accordingly, I do not have discretion to permit reply briefs. To the extent that I do have such discretion, I exercise that discretion to deny the Employer's motion to file a reply brief and the reply brief that was filed is hereby stricken.

² To the extent the Employer's exceptions rely or relate to the Hearing Officer's credibility findings, it is the Board's established policy that a Hearing Officer's credibility findings in proceedings of this type should only be reversed "when the clear preponderance of all the relevant evidence convinces [the Board] that the [hearing officer's] resolution is incorrect." I find no basis in the record for reversing the Hearing Officer's credibility findings.

the Petitioner honored one such request (the only request to do so). *Saviar* is simply inapplicable here.

Objection 2: The effect of the [Petitioner's] distribution of the "We Are Sunset Station" booklet, particularly in the context of other [Petitioner] election-day conduct, pre-election pressure, intimidation, harassment, and coercion, was to create the impression that the [Petitioner] was monitoring whether and how employees voted; created an impression of surveillance; created an atmosphere of fear and reprisal; intimidated, coerced and chilled employees generally; and intimidated, coerced and chilled employees who were not included in the booklet to stay away from the polls and not vote out of fear that "no" voters would be recognized and subjected to retaliation and bullying, rendering a free and fair election impossible.

For the reasons set forth in the Hearing Officer's report, I agree with her recommendation to overrule Objection 2.

In Objection 2, the Employer contends that the "We Are Sunset Station" booklet inversely identifies those employees who are choosing to refrain from supporting the Petitioner. That position is speculative at best. The fact that employees chose not to be included in the booklet can simply mean that they did not want their picture to be included in the booklet, which has nothing to do with whether they support the Petitioner or not. In any case, the Employer's position taken to its natural conclusion would mean any action on behalf of the Petitioner, including actions by the Petitioner's supporters, would reveal the preferences of those employees who were not willing to overtly show their support for the Petitioner. The Employer's position would find objectionable conduct simply by the fact employees exercised their Section 7 rights. The Employer offers no Board precedent that would support such conduct is a basis for setting aside an election.

Objection 3: The [Petitioner] misled bargaining unit employees, interfered with the conduct of a free and fair election, and suppressed voter turnout by falsely informing bargaining unit employees that they should not vote (rather than vote "no"), if they opposed the [Petitioner].

For the reasons set forth in the Hearing Officer's report, I agree with her recommendation to overrule Objection 3.

For Objection 3, the Employer failed to present any evidence at hearing in support of the objection. Accordingly, I adopt the Hearing Officer's recommendation that this objection be overruled.

Objection 4: [Petitioner] supporters wearing pro-[Petitioner] clothing and buttons were stationed in a pathway leading to the polls, requiring that bargaining unit employees using this pathway pass by them in order to vote (notably, the Employer's own surveillance cameras in this pathway were "hooded" (i.e., covered) out of recognition that many voters would go to the polls through this route). This conduct created an impression of surveillance;

constituted prohibited electioneering; was intimidating, coercive and chilling; created an atmosphere of fear and reprisal; built on earlier pre-election [Petitioner] intimidation and harassment to dissuade “no” voters from going to the polls; rendering a free and fair election impossible.

For the reasons set forth in the Hearing Officer’s report, I agree with her recommendation to overrule Objection 4.

In Objection 4, the Employer raises the question of whether the Petitioner’s supporters, including its Committee Leaders, were agents of the Petitioner under the Act or common law agency principles.³ The Employer as the objecting party has the burden of demonstrating that the named individuals were agents of the Petitioner. *Millard Processing Services*, 304 NLRB 770, 771 (1991). In the context of an organizing campaign, an individual’s agency status must be established with respect to the specific unlawful conduct that has been alleged. *Pan-Oston Co.*, 336 NLRB 305, 306 (2001). The individual must have actual or apparent authority to act on behalf of the party in order to establish that the individual was an agent of the party. The Board has held that an individual has apparent authority when the principal gives a third party a reasonable basis to believe that the principal has authorized the alleged agent to engage in certain conduct. *Southern Bag Corp.*, 315 NLRB 725 (1994). See also *Alliance Rubber Co.*, 286 NLRB 645, 646 (1987). The Board looks at whether the unit would reasonably believe that the alleged agent was speaking and acting for the alleged principal. *Waterbed World*, 286 NLRB 425, 426-427 (1987), citing *Einhorn Enterprises*, 279 NLRB 576 (1986).

In the context of an organizing campaign, the Board has found that mere active support of the Petitioner is not sufficient to establish an agency relationship. *United Builders Supply Co.*, 287 NLRB 1364, 1365 (1988); see also *Tuf-Flex Glass v. NLRB*, 715 F.2d 291, 296 (7th Cir. 1983). In fact, even soliciting cards on behalf of the union or participating in an in-plant organizing committee are not necessarily sufficient to establish an agency relationship. See *Health Care and Retirement Corporation of America v. NLRB*, 255 F.3d 276 (6th Cir. 2000); *Advance Products. Corp.*, 304 NLRB 436 (1991).

The Employer’s argument that the Petitioner’s supporters were acting as agents of the Petitioner seems to stem from their participation in the Petitioner’s organizing campaign prior to the election and from their conduct on election day. An argument that the supporters were agents of the Petitioner during the campaign and, therefore, must be agents on election day would necessitate that agency status, once granted by the principal, is absolute and not subject to limitations in time or scope. It would suggest that the principle is not able to withdraw that agency once it has been granted. Such a theory is not supported by Board law or common law

³ It should be noted that the Board considers common law agency principles in determining whether an employee is an agent of a party.

“The Board applies common law principles of agency when it examines whether an employee is an agent of the employer while making a particular statement or taking a particular action. Under these common law principles, the Board may find agency based on either actual or apparent authority to act for the employer. As to the latter, “[a]pparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question.” *Southern Bag Corp.*, 315 NLRB 725 (1994).” *Cooper Hand Tools, Div. of Cooper Indus., Inc.*, 328 NLRB 145 (1999)

agency principles. The Employer also cites to *Station GVR Acquisition, LLC*, Hearing Officer's Report on Objections, Case No. 28-RC-208266, at pp. 8 n.5, 13 (Feb. 9, 2018) (finding Committee Leaders to be special agents of the union). The hearing officer's finding in that case, however, was limited to the committee leaders' role in a get-out-the-vote campaign, where the petitioner in that case specifically instructed committee leaders to ask employees if and when they intended to vote and report their responses back to the petitioner. No such circumstances exist here. Rather, the Petitioner's Committee Leaders encouraged employees to visit the Petitioner's satellite office and meet with organizers during that campaign, and then reminded and encouraged employees to vote on the election day. Indeed, the Committee Leaders were specifically instructed to stay off the second floor of the Employer's facility, other than when they were voting or had some work-related reason to be on that floor, which is where the voting location was designated.

Moreover, the Board agent's ability to enforce any no-electioneering rules extended to the voting line and area immediately outside the room. The evidence shows no impermissible electioneering by voters or agents of the parties took place in the voting area or the area immediately outside the voting area (i.e. the Sunset Room). The Employer argues that the mere presence of the Petitioner's supporters in other areas was objectionable, regardless of whether they engaged in any further coercive conduct: "a party engages in objectionable conduct sufficient to set aside an election if one of its agents is continually present in a place where employees have to pass in order to vote." *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 993 (D.C. Cir. 2001). However, since the supporters are not agents of the Petitioner, such argument fails. Moreover, even if the supporters were agents of the Petitioner, the record evidence fails to show that their conduct necessitates setting aside the election where there is no evidence of improper electioneering or coercive speech by the Petitioner's supporters. See, e.g., *Performance Measurements*, 148 NLRB 1657, 1659 (1964); *Nathan Katz Realty* at 991 (discussing application of the *Milchem* rule) (citing to *Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 270 (D.C. Cir. 1998)).

Objection 5: To the extent any of the [Petitioner's] as described above, is insufficient in isolation to constitute objectionable conduct, it must be viewed in the entire context of the [Petitioner's] pre-election and election-day conduct, which in totality had the effect of intimidating, coercing and chilling voters, suppressing voter turnout, creating an impression of surveillance and an atmosphere of fear and reprisal, and instilling a fear of [Petitioner] retaliation and bullying, thereby making a free and fair election impossible.

For the reasons set forth in the Hearing Officer's report, I agree with her recommendation to overrule Objection 5.

In Objection 5, the Employer cites to several cases in arguing that the conduct discussed above, taken as a whole, warrants setting aside the election in this case. See e.g., *NLRB v. Monark Boat Co.*, 713 F.2d 355, 359 (8th Cir. 1983) ("[E]ven where an incident of misconduct, not insubstantial in nature, is insufficient by itself to show that an election was not an expression of free choice, two or more such incidents, when considered together in the totality of the circumstances, may be deemed sufficient to support such a conclusion."); *Bauer Welding & Metal Fabricators, Inc. v. NLRB*, 676 F.2d 314, 318 (8th Cir. 1982) (same); see also *Pac. Coast*

Sightseeing Tours & Charters, Inc., 365 N.L.R.B. No. 131 (2017) (The standard for evaluating objectionable conduct is “whether the alleged misconduct, taken as a whole, warrants a new election because it has the tendency to interfere with employees’ freedom of choice and could well have affected the outcome of the election.”). The cases cited are distinguishable. *NLRB v. Monark* and *Bauer Welding & Metal Fabricators, Inc.* are cases where the Regional Director dismissed a party’s objections without a hearing, and the Eighth Circuit refused to enforce the subsequent Board orders. Here, a hearing on the objections was conducted, evidence obtained, arguments heard, and the Employer failed to establish objectionable conduct. The Employer’s cite to *Pac. Coast Sightseeing Tours & Charters, Inc.* is also not dispositive here. The Board in that case adopted an ALJ’s recitation of cases describing the objective standard of review of alleged misconduct as it relates to an election (as opposed to an unfair labor practice determination). As discussed above, none of the conduct discussed herein was found to be objectionable. Accordingly, there is no basis in finding that an amalgamation of non-objectionable conduct could become itself objectionable.

For the reasons set forth in the Hearing Officer’s report, I agree with her recommendation to overrule these objections.

II. CONCLUSION

Based on the above and having carefully reviewed the entire record, the Hearing Officer’s report and recommendations, and the exceptions and arguments made by the parties, I overrule the objections, and I shall certify the Petitioner as the representative of the appropriate bargaining unit described below.

III. CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for Local Joint Executive Board of Las Vegas a/w Unite Here International Union, and that it is the exclusive representative of all the employees in the following bargaining unit:

INCLUDED: All full-time and regular part-time banquet bartenders, banquet porters, banquet servers, bar/beverage porters, bartenders, bellpersons, beverage servers, buspersons, concession workers, concession workers/cooks, cooks, cooks (tipped), cook helpers, counter attendants, food servers, guest room attendants, hostpersons/cashiers, housepersons, kitchen runners, kitchen workers, lead counter attendants, pantry workers, porters, room runners, sprinters, status board operators, stove persons, team member dining room attendants, utility porters, and VIP bartenders employed by the Employer at its facility in Las Vegas, Nevada.

EXCLUDED: All other employees, front-desk employees, valet parkers, gaming employees (dealers, slot attendants, cage cashiers), inspectresses, engineering & maintenance employees, VIP attendants-pool grill, office clerical employees, confidential employees, guards, managers and supervisors as defined by the Act.

IV. REQUEST FOR REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by **November 19, 2019**. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated at Phoenix, Arizona, this 5th day of November 2019.

/s/ **Cornele A. Overstreet**

Cornele A. Overstreet, Regional Director

Exhibit E

1 to subpoena?

2 A. Yes.

3 Q. We want to call your attention to the day of the
4 election, which was June 13, 2019. Do you recall that day?

5 A. Yes.

6 Q. Where was the election held?

[7 A. In the second floor Sunset Room.

8 Q. And that's at Sunset Station?

9 A. Sunset Station.

10 Q. Did you work on the day of the election?

11 A. Yes, I did.

12 Q. During what hours did you work?

13 A. 2 to 9:30.

14 Q. In what location did you work?

15 A. Grand Café.

16 Q. I'm going to show you a document that we will mark for
17 identification as Employer's Exhibit 1.

18 **(Employer's Exhibit 1 marked for identification.)**

19 MS. LIPKIN: And I'm marking it EX-1, standing for
20 Employer Exhibit 1. And, Madam Hearing Officer, we believe
21 that it is easiest to look at this diagram when holding it,
22 if I may, upside down and on a diagonal.

23 Mr. Myers, do you think it's easiest?

24 MR. MYERS: Yes.

25 MS. LIPKIN: Yes. Thank you.

1 been marked for identification as Employer's Exhibit 1 be
2 placed in the record as evidence.

3 HEARING OFFICER LEUNG: Any objections?

4 MR. MYERS: No.

5 MS. LIPKIN: Thank you.

6 HEARING OFFICER LEUNG: It's received.

7 **(Employer's Exhibit 1 received in evidence.)**

8 Q. BY MS. LIPKIN: Ms. Irwin, I want to call your attention
9 to the labels on this architectural drawing. First, you
10 referred to the executive elevator, I believe?

11 A. Yes.

12 Q. The words here are "Exec Elev." Do you see that?

13 A. Yes.

14 Q. When you say executive elevator, are you referring to
15 what is marked as "Exec Elev"?

16 A. Yes.

17 Q. And you referred to the walkway to the executive
18 elevator; am I correct?

19 A. Yes.

20 Q. And if I may, Ms. Irwin, one thing that we had said was
21 that we think it is easiest to look at this diagram kind of
22 upside down but kind of on a bit of a slant, and what I
23 describe as the bottom of the diagram, when you hold it in
24 that manner, correct me if I'm wrong, there's a hallway in
25 front of the Grand Café that goes from the hotel lobby to

- 1 the hotel tower; is that right?
- 2 A. Yes.
- 3 Q. But in the center of this diagram, you referred to the
- 4 walkway; is that right?
- 5 A. Yes.
- 6 Q. And that walkway is bordered by the Grand Café on one
- 7 side and a wall on the other; is that correct?
- 8 A. Yes.
- 9 Q. And it leads to the executive elevator?
- 10 A. Yes.
- 11 Q. Thank you. And to where does the executive elevator
- 12 transport its passengers?
- 13 A. To the second floor.
- 14 Q. And I'm going to show you a photograph that we will mark
- 15 as Employer's Exhibit 2. We're showing you a photo.
- 16 **(Employer's Exhibit 2 marked for identification.)**
- 17 Q. BY MS. LIPKIN: Ms. Irwin, can you identify that photo
- 18 for us? What is that a photo of?
- 19 A. The elevator.
- 20 Q. And on what level is this elevator now?
- 21 A. This is on the second floor.
- 22 Q. Okay. So, correct me if I'm wrong, that elevator has
- 23 only two stops, the first floor and the second floor; is
- 24 that right?
- 25 A. Yes.

1 Q. And we looked at the architectural drawing showing us
2 the first floor location of the elevator, and then this
3 photo shows us the second floor location for the elevator.

4 A. Yes.

5 Q. Now, I note on this photo, there's a word -- there are
6 words "Surv Camera." Correct me if I'm wrong, that stands
7 for surveillance camera.

8 A. Surveillance camera.

9 Q. And to the left of the words surveillance camera, there
10 appears to be a room that's darkened; is that correct?

11 A. Yes.

12 Q. What room is that if you know?

13 A. Sunset Room.

14 Q. Does this photograph accurately reflect the location of
15 the elevator on the second floor of Sunset Station and the
16 pathway to the Sunset Room where the election was held?

17 A. Yes.

18 Q. And it shows, correct me if I'm wrong, that the Sunset
19 Room is very close to that elevator; is that correct?

20 A. Yes.

21 MS. LIPKIN: Madam Hearing Officer, we move what has
22 been marked as Employer's Exhibit 2 be placed in the record.

23 HEARING OFFICER LEUNG: Any objections?

24 MR. MYERS: No objection.

25 MS. LIPKIN: Thank you.

1 Q. Thank you. Ms. Irwin, we want to clarify. You
2 testified that you observed activity in the walkway as you
3 testified to between 4 and 7. Is it your testimony that it
4 occurred during that entire period of 4 to 7 or somehow
5 limited?

6 A. No, I saw them. They were there for those hours.

7 Q. Thank you.

8 A. It was a long period of time, yes.

9 Q. And, again, how many red shirts did you see standing in
10 the walkway?

11 A. About a good 8 to 10.

12 MS. LIPKIN: Thank you. We have no further questions.
13 Thank you.

14 HEARING OFFICER LEUNG: Cross?

15 MR. MYERS: If I may just have a minute?

16 HEARING OFFICER LEUNG: Sure.

17 MR. MYERS: Thank you.

18 Okay. I'm ready. Thank you.

19 **CROSS-EXAMINATION**

20 Q. BY MR. MYERS: Good morning, Ms. Irwin. My name is Eric
21 Myers. I'm the attorney for the Union.

22 A. Good morning.

23 Q. I just want to ask you some questions so I understand
24 your full testimony, okay. If you -- do you have Employer
25 Exhibit 1 in front of you?

- 1 know?
- 2 A. The name of the person with the red shirt on?
- 3 Q. Yeah.
- 4 A. Dennis.
- 5 Q. Dennis?
- 6 A. Yes.
- 7 Q. Do you know the last name?
- 8 A. No, I don't.
- 9 Q. Okay. Where -- is Dennis an employee of the Sunset
10 Station?
- 11 A. Yes.
- 12 Q. Where does Dennis work? Do you know? What department?
- 13 THE WITNESS: Answer it?
- 14 HEARING OFFICER LEUNG: Yes.
- 15 THE WITNESS: He works in the café.
- 16 Q. BY MR. MYERS: In the same café, the Grand Café?
- 17 A. Um-hum.
- 18 Q. And that's the only individual you recognized by name?
- 19 A. Yes.
- 20 Q. And was Dennis there the entire -- I mean I know that --
21 I understand that you didn't watch for 3 hours straight.
22 But the times that you looked up, did you see Dennis --
- 23 A. Yes.
- 24 Q. -- there each time?
- 25 A. Yes.

1 A. When I saw them with the red shirts, I knew that they
2 were from the Union. Why? Because when I was an observer,
3 I saw them come in with red shirts on.

4 Q. Did you have an impression as to why those red shirts
5 were present in the walkway from 4 to 7 p.m. on the day of
6 the election?

7 A. No, I didn't know why they were there. They were just
8 there for that time, and I didn't know why they were there.
9 I didn't -- I just thought -- my opinion of the vote was to
10 come in, go to the second floor, do your voting, and leave
11 the property. I didn't know that -- I never had a vote like
12 this before. So I didn't know. So I thought you come down,
13 you leave. You come in and you go up, come down and you go.
14 But they were there for the 3 hours, 4 to 7.

15 MS. LIPKIN: Thank you. We have no further questions.

16 HEARING OFFICER LEUNG: Any recross based on that?

17 **RECROSS-EXAMINATION**

18 Q. BY MR. MYERS: I just want to make sure, and I
19 understand but it's an important point. You say they were
20 there for 3 hours, right?

21 A. Yes.

22 Q. But your testimony is you can't recall how many times
23 during that 3 hours you looked up and saw them there, right?

24 A. Yes.

25 Q. It could have been 2 times, it could have been 15 times,

1 Station. That's the executive elevator and the hallway that
2 terminates at the back of the house doors.

3 A. Correct.

4 Q. Okay. Thank you. And then you also have in front of
5 you EX-4, another photograph showing the walkway. In this
6 instance, the target of the camera goes from the area around
7 where the elevator is towards the glass doors leading to the
8 parking area; is that correct?

9 A. Correct.

10 Q. Now I want to call your attention -- I want to point you
11 once again to EX-1, and we recommend that it be held upside
12 down and kind of on a slant. And I note the label of "Exec
13 Elev," and that's been explained as executive elevator,
14 correct?

15 A. Correct.

[16 Q. And that's the executive elevator that transported
17 passengers from the first floor to the second floor where --
18 very close to the Sunset Room; is that correct?

19 A. Correct.

20 Q. Thank you. Now, on the day of the election, did you
21 have occasion to be on the first floor of Sunset Station in
22 the area depicted in Exhibit 1, the architectural drawing,
23 Exhibit 3, the photo that shows the hallway adjacent to the
24 elevator and the back of house doors, and Exhibit 4, once
25 again the walkway, but this shows the glass doors leading to

1 the exterior of the building?

2 A. Yes, I was.

3 Q. Thank you. At approximately what time were you at that
4 location?

5 A. It was somewhere between 7:30 a.m. and 8 a.m.

6 Q. And what time did you start work that day?

7 A. 7:30 a.m.

8 Q. And when you were in the area between 7:30 and 8 a.m.,
9 what, if anything, did you see on the first floor of Sunset
10 Station in what we call the walkway or the hallway?

11 A. I saw individuals wearing red union shirts.

12 Q. How many individuals did you see in red union shirts?

13 A. In that area?

14 Q. Yes.

15 A. I saw seven.

16 Q. Thank you. You refer to them as red union shirts. How
17 do you know that they were union shirts?

18 A. They said the word "Union" on the red shirt.

19 Q. Thank you. Did you observe team members in red shirts
20 in other locations in the front of the house or the back of
21 the house?

22 A. Yes.

23 Q. Before 7:30 or after 8 o'clock in the morning?

24 A. Both.

25 Q. Okay. Tell us what you saw and where you saw them.

1 event that we were refrained from the inquiry, that means
2 that there can be no later claim that the Employer failed to
3 put on testimony about feelings of coercion, intimidation,
4 whatever it may be.

5 MR. MYERS: Well, I don't know what counsel's talking
6 about when I said I've argued many times. Counsel's
7 chuckling over there, but she can point me to a brief. I
8 mean she's certainly made over the years many creative
9 objections, but I don't recall an objection regarding this
10 sort of subjective elements. So I can't respond to that. I
11 think it matters what she observed, not what she felt.

12 HEARING OFFICER LEUNG: Well, I will allow the inquiry
13 for whatever it's worth, although again I will ask that we
14 keep it somewhat limited in nature.

15 MS. LIPKIN: Thank you, Madam Hearing Officer.

16 Q. BY MS. LIPKIN: So our question, Ms. Rumble, was how did
17 you feel about the individuals being present at those times
18 and those locations?

19 A. I felt a little intimidated, uncomfortable. I felt like
20 they were pressuring people to vote in favor of the Union
21 and pressuring people who were not in favor not to vote.
22 Those were my feelings.

23 MS. LIPKIN: We have no further questions. Thank you.

24 HEARING OFFICER LEUNG: Cross?

25 **CROSS-EXAMINATION**

1 HEARING OFFICER LEUNG: Okay.

2 THE WITNESS: Okay. So we're talking about the same
3 button.

4 MR. MYERS: Yeah.

5 THE WITNESS: Okay.

6 Q. BY MS. LIPKIN: So just to make sure my question is
7 clear, on the day of the election, some folks had red
8 shirts?

9 A. Yes.

10 Q. On other days, you had seen some of those folks with red
11 shirts wear a gold button?

12 A. Yes.

13 Q. Or brown button.

14 A. Brown.

15 Q. You had seen other of those folks wearing red shirts
16 wear a committee leader button?

17 A. Yes.

18 Q. It was a mix of both?

19 A. And some of them wore both buttons at the same time.

20 Q. Some of them might wear both buttons?

21 A. Yes.

22 Q. Okay. Fair enough. But you don't know what all that
23 meant. You don't know what the button -- you don't know
24 what committee --

25 A. I don't know what "Committee Leader" means. I don't

1 MS. LIPKIN: Thank you.

2 THE WITNESS: Repeat the question, please.

3 Q. BY MS. LIPKIN: Thank you. What was -- why were you
4 shocked and surprised the first time that you saw this
5 booklet in the TDR?

6 A. I was shocked to see the team members pictures in here
7 saying that they are going to vote yes.

8 Q. What was your impression, if any, of the Union's purpose
9 in assuming the expense and effort of taking the
10 photographs, preparing, duplicating, and distributing the
11 booklet?

12 MR. MYERS: Objection. Foundation and relevant.

13 HEARING OFFICER LEUNG: Sustained.

14 Q. BY MS. LIPKIN: I want to call your attention to the day
15 of the election which was June 13, 2019. Do you recall that
16 day?

17 A. Yes.

18 Q. Where was the election held?

19 A. On the second floor in the Sunset Room of Sunset
20 Station.

21 Q. Thank you. And in front of you, you have several
22 documents that have already been accepted into evidence.
23 I'm going to call your attention to Employer's Exhibit 1,
24 which I refer to as an architectural drawing of part of the
25 first floor of Sunset Station. And then there are several

1 Q. Okay. On the day of the election, did you have occasion
2 to be on the first floor of Sunset Station in the area
3 depicted as the hallway on Exhibit 1, and that's location
4 between the Grand Café and the wall leading to the executive
5 elevator? Did you have similarly, it would be the same
6 area, occasion to be in the area captured in Exhibit 3,
7 which is a photograph of the hallway leading to the elevator
8 on the first floor, and Exhibit 4, which is the hallway
9 along the Grand Café leading from the elevator?

10 A. Yes.

11 Q. What did you see in that location?

12 A. The first time I saw it, I saw team members in front of
13 the elevator where we were supposed to go up to go vote.

14 Q. And how many team members did you see there?

15 A. I think roughly between six and eight.

16 Q. And can you describe their attire?

17 A. Some had red shirts on, some had regular street clothes
18 on, and some I believe had a uniform.

19 Q. I'm sorry, had a what?

20 A. Uniforms.

21 Q. Okay. And about what time was that when you saw the six
22 to eight individuals, team members, pardon me, standing near
23 the elevator on the first floor?

24 A. It was roughly between 11:30 and 12:30.

25 Q. And what were those team members doing, those six to

1 Q. On a Thursday.

2 A. Um-hum.

3 Q. Do you remember how many days prior to the election you
4 first saw this book?

5 A. I probably want to say 3 days.

6 Q. And you saw it in the TDR?

7 A. Yes.

8 Q. Are you in the book? Is your picture in here?

9 A. No, I'm not in the book.

10 Q. Do you have any idea, based on your own personal
11 experience, how it came to be that the individuals who are
12 photographed here came to be photographed?

13 A. Repeat the question, please.

14 Q. Do you know how the individuals who are photographed
15 here --

16 A. Um-hum.

17 Q. -- how it was that they came to be included in this
18 booklet?

19 A. It looks like they had their pictures taken at the Union
20 Hall.

21 Q. Have you yourself been to the Union Hall?

22 A. No.

23 Q. Okay. Were you asked to have your picture taken in this
24 booklet?

25 A. No.

1 Q. So your knowledge of what's in this booklet is based on
2 just what you see from the booklet?

3 A. Right.

4 Q. Okay. It's not like you had a conversation with any of
5 the people in here? You didn't ask them how it was they
6 came to be in the booklet or anything like that?

7 MS. LIPKIN: Objection to the question. It was
8 compound.

9 MR. MYERS: I'll rephrase it.

10 MS. LIPKIN: It needs to be broken down.

11 MR. MYERS: I'll rephrase it.

12 Q. BY MR. MYERS: Did you talk to any of the folks who are
13 featured in this booklet about why they're in the booklet?

14 A. I did ask a friend. I asked somebody, their picture was
15 in the book, and yes, I did ask.

16 Q. Well, at the risk of eliciting hearsay, I'll say you
17 asked, but you yourself have no personal knowledge about --
18 you were not asked to be in the booklet?

19 A. No, I was not.

20 Q. Okay. You testified that you were shocked when you saw
21 the booklet. What shocked you?

22 A. The phrase, "We are voting yes."

[23 Q. Why did that shock you?

24 A. I thought all voting was private.

25 Q. Anything else? Any other reason it shocked you?

1 A. No, it's not there. No.

2 Q. I'm sorry.

3 A. It's not there. There's double doors that goes to other
4 offices. The freight elevator's around -- can I say this
5 way, around to the backside area down the hallway and goes
6 to the first floor of the casino -- of the pathway of our
7 TDR room and HR office and all that area.

8 Q. All right. Do you know if that was a means by which
9 employees went up to the Sunset Room to vote?

10 A. No, I do not know that.

11 Q. And as I'd be leaving the elevator out here, the one
12 that is pictured in Employer 2, and we do see the executive
13 elevator, if instead of turning around and going to the
14 Sunset Room this way, is there anything on the right side of
15 the photograph or going forward from that elevator that -- I
16 don't know, any rooms or any work areas or anything? What
17 is that?

18 A. I believe there's a wall, and I think to the right
19 there's something down there. I'm not privileged to that
20 information, and then there's bathrooms to the left, and
21 then the executive office is up there for the executive.

22 Q. This is executive office area. Is this the back of the
23 house or front of the house? This area shown in Employer 2.
24 Is this a public area or back of the house area?

25 A. It's public.

1 HEARING OFFICER LEUNG: So all of those folks? Is that
2 what you meant by team members?

3 THE WITNESS: I don't understand your question.

4 HEARING OFFICER LEUNG: Are you referring to a subset?

5 THE WITNESS: No, I'm referring to the employees that
6 are part of this discussion right here --

7 HEARING OFFICER LEUNG: Okay.

8 THE WITNESS: -- which is the 588 folks on the list.

9 MS. LIPKIN: Madam Hearing Officer, if I may, this
10 Employer refers to its employees as team members, and I
11 believe that may explain what was being said.

12 HEARING OFFICER LEUNG: Thank you.

13 Q. BY MS. LIPKIN: And did Delores Brown direct union
14 supporters to stand on the first floor adjacent to the
15 elevator on the day of and during the time of the election?

16 A. My understanding is that the committee leaders that were
17 in a meeting pre-election, they're the ones that decided
18 what the best place to be, to encourage their coworkers to
19 vote, to go vote, because we don't work inside there. We're
20 not allowed to be all around there. We're not employees.
21 So they're the ones that came up with the best places to be,
22 and we just -- my understanding, you know, which is, look,
23 they're very excited. They knew they were winning. They
24 had, you know, they were very excited. They waited for this
25 day for a long time. They wanted to get their people out to

1 vote, and they were very excited, and they, you know, they
2 did their job, in the TDR where they're allowed to be,
3 outside the TDR, the parking lot, by the elevators where the
4 employees come down, all legit areas to campaign.

5 Q. So it is the Union's position that there was nothing
6 improper about the bargaining unit employees, the committee
7 leaders, other supporters, standing in the pathway to the
8 elevator on the first floor?

9 A. I don't think they were in anybody's way. They were in
10 the hallway, but they were against one of the walls. The
11 testimony I heard was that folks were not standing in front
12 of the elevator but were along the wall, on the backside or
13 the sides of door, not in the path. That's what I heard
14 today.

15 MR. MYERS: I'd like to object as nonresponsive, and
16 perhaps the Hearing Officer -- I'm not sure if the witness
17 is basing his testimony on what he heard, the testimony of
18 other witnesses, or what he has personal knowledge of, and I
19 think that's an important distinction to make, whether he
20 has personal knowledge of whether people were standing in
21 areas or whether he just heard what three witnesses
22 testified to here today.

23 HEARING OFFICER LEUNG: Ms. Lipkin.

24 MS. LIPKIN: We're satisfied if we can achieve that
25 clarification. Thank you.

1 A. Where she gave the instructions to the committee
2 leaders. I told Delores ahead of time what to tell them.

3 Q. Okay. You told Delores ahead of time what to tell --

4 A. Yes.

5 Q. -- committee leaders?

6 A. Correct.

7 Q. And what instructions did you give to Delores Brown to
8 give to committee leaders?

9 A. The one thing that I was very clear on is to make sure
10 they understood the importance of not campaigning on the
11 second floor, that we didn't want any problems there, that
12 that is frowned upon, the Board hates it, anything near the
13 polling place, and the Company will see it and it will mess
14 with your election, and make it very clear don't go up
15 there. Now, we can't control what folks do, but they want
16 to win, and this group, they followed that rule as far as I
17 know through the whole election day. They just went up --
18 we told them, they go up and vote once, and then stay on the
19 first floor. Don't take anybody up to vote, and just stay
20 on the first floor.

21 Q. Did you give any instructions about -- did you have any
22 conversations with Delores Brown about this hallway that's
23 now at issue, not just the first floor generally but this
24 hallway?

25 A. Not really. That was -- you know, I just told her what

1 the rules are for election day, the difference about using
2 lists that day. No committee has lists, no worker has
3 lists, nothing around that has any list, and so that was a
4 clear instruction that she followed. And then I said that
5 the rule, other than the floor of the voting area and the
6 list, everything else is a go, a regular, whatever you do in
7 organizing you're allowed to do. You're allowed to
8 campaign. You're allowed to encourage people to vote.
9 You're allowed to hand leaflets, if we had leaflets, but we
10 didn't. You're allowed to, you know, be in the TDR, in the
11 break areas, in the parking lots, and I told her to
12 encourage folks that were off work to participate in that.
13 If they're off work, you know, they could be there because
14 stations have a policy of allowing people that are off work
15 in the TDR. So that's -- and so they had folks do that.

16 Q. Did you instruct Delores Brown to instruct workers to
17 congregate in the hallway around the executive elevator?

18 A. No.

19 Q. Do you know one way or the other whether she gave such
20 instructions to committee leaders?

21 A. Well, I know she gave instructions because I know what
22 she said afterwards. She had them -- she wanted people in
23 the TDR. She wanted people on the ground elevator where the
24 employee parking garage is, so they can catch folks there.
25 They had them at the -- and then they had them in that

1 hallway because some people, even though they're supposed to
2 park upstairs, they park in the regular parking lot and come
3 in through the Grand Café entrance there. So they had
4 people there to catch people there and encourage them to
5 vote because it's a 1-day vote. We wanted to make sure we
6 encouraged everyone to vote.

7 MR. MYERS: Let me see if I have any further questions.
8 No further questions.

9 HEARING OFFICER LEUNG: Any redirect?

10 MS. LIPKIN: Can we have a moment?

11 HEARING OFFICER LEUNG: Sure thing.

12 MS. LIPKIN: Thank you.

13 HEARING OFFICER LEUNG: Let's go off the record.

14 (Off the record at 4:25 p.m.)

15 HEARING OFFICER LEUNG: Okay. Let's go back on the
16 record.

17 REDIRECT EXAMINATION

18 Q. BY MS. LIPKIN: Mr. Kline, the pre-election conference
19 at Sunset Station, do you recall that it was held on the
20 afternoon of that Wednesday of June 12th?

21 A. Yes.

22 Q. And do you recall that earlier in the day, there was a
23 pre-election conference for Fiesta Rancho that day?

24 A. Yes.

25 Q. And Fiesta Rancho is an affiliate of Sunset Station; is

1 A. Oh, okay. Yeah. It's not real food, but okay. Snacks.

2 Q. On the day of the election, did you attend -- at the
3 commencement of every voting session, there was an
4 opportunity to visit the voting room. Did you attend any of
5 those opening of the polls in addition to the first voting
6 session at 6 a.m.?

7 A. I was there at the opening of the polls and then the
8 last one, on the count, when it was closed.

9 Q. And you did not therefore attend the opening of the
10 polls for any of the voting sessions, correct?

11 A. Just the 6 --

12 Q. The first one?

13 A. -- the first one, yes.

14 Q. And am I correct that it's your testimony that you
15 attended the closing of the polls only for the last voting
16 session?

17 A. Yes.

18 Q. Were committee leaders encouraged to campaign on the day
19 of the election?

20 A. Yes. They had a right to do so.

21 Q. I understand. Were they encouraged by the Union, by
22 you --

23 A. No.

24 Q. -- or by the organizers, if you know, to campaign on the
25 day of the election?

1 MS. LIPKIN: We understand. Thank you.

2 Q. BY MS. LIPKIN: So the question, Ms. Brown, was did you
3 or the organizers, if you know, encourage team members --
4 excuse me, encourage committee leaders to campaign on the day
5 of the election?

6 A. I think the committee leaders was encouraged by a lot of
7 things.

8 HEARING OFFICER LEUNG: Ms. Brown, if there's a yes or
9 no question, if you could give us an answer that is either a
10 yes or a no for the clarity of the record.

11 THE WITNESS: Okay, yes.

12 MS. LIPKIN: Thank you.

13 HEARING OFFICER LEUNG: Thank you.

14 MS. LIPKIN: Madam Hearing Officer, the initial response
15 from the witness was nonresponsive, was consistent with the
16 prior nonresponsive answer that was stricken. We ask that
17 that be stricken as well.

18 MR. MYERS: We believe that the time to ask for an item
19 to have been stricken was after the answer is given.

20 MS. LIPKIN: This is --

21 HEARING OFFICER LEUNG: I'm going to deny that motion.

22 MS. LIPKIN: Okay. Thank you.

23 No further questions.

24 HEARING OFFICER LEUNG: Any redirect?

25 **REDIRECT EXAMINATION**

Exhibit F

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

**STATION GVR ACQUISITION, LLC D/B/A
GREEN VALLEY RANCH RESORT SPA CASINO**

Employer

and

Case 28-RC-208266

**LOCAL JOINT EXECUTIVE BOARD OF LAS
VEGAS AFFILIATED WITH UNITE HERE
INTERNATIONAL UNION**

Petitioner

HEARING OFFICER'S REPORT ON OBJECTIONS

I. INTRODUCTION

On November 8 and 9, 2017,¹ agents of Region 28 conducted an election among certain employees of the Employer. A majority of employees casting ballots in the election voted for representation by the Petitioner. However, the Employer contests the results of the election claiming that the Petitioner, Petitioner's committee leaders, and the Board agents conducting the election engaged in objectionable conduct and, therefore, asks that the election be set aside and that a new election be held.

The Employer argues that the Petitioner engaged in misconduct in the weeks prior to the election and on the days of the election. More specifically, the Employer contends that, during the critical period, the Petitioner prepared Election Day Sign Up sheets and instructed its committee leaders to direct eligible voters that they must sign-up to vote during a specific voting session and that they must vote in favor of the Petitioner. The remaining objections charge the Petitioner and its agents with misconduct occurring on the days of the election. In this regard, the Employer contends that Petitioner's agents, specifically committee leaders or other pro-Petitioner employees: (1) escorted groups of voters to the polling room; (2) escorted voters to the polling room one-at-a-time; (3) directed voters to show their marked ballots to the union observers to prove how they voted; (4) directed voters to wear union buttons when voting; (5) patrolled the hallway near the polling room and maintained a physical presence near the polling room; (6) instructed voters waiting in line to vote where to stand and when to enter the voting room creating the impression that the Petitioner, not the Board, controlled the voting process; and (7) engaged in objectionable list-keeping. The Employer also contends that the Petitioner designated a person who could not read as an observer for the purposes of intimidating voters.

¹ All dates occurred in 2017 unless otherwise specified.

The Employer also contends that the Board agents engaged in misconduct in four out of 12 objections. More specifically, the Employer contends that the Board agents: (1) allowed voters to openly carry their cell phones into voting booths and the voting room and failed to instruct voters that the use of such devices was restricted; (2) allowed voters to linger or converse near the ballot box and/or beverage station thereby enabling voter fraud, coercion and intimidation; (3) failed to maintain an appropriate flow of voters resulting in unreliable verifications of voter eligibility; and (4) permitted a purported illiterate employee to serve as a union observer, who the Petitioner designated as an observer for the sole purpose of intimidating voters.

After conducting the hearing and carefully reviewing the evidence as well as arguments made by the parties, I recommend that the Employer's objections be overruled because the evidence is insufficient to show that either the Petitioner, Petitioner's committee leaders, and the Board agents engaged in objectionable conduct. More specifically, there was no evidence that the Petitioner and its committee leaders engaged in coercive conduct in connection with its pre-election campaigning. Moreover, there is no evidence that any of the committee leaders or other employees or individuals engaged in any misconduct at or near the polls. Finally, there is no evidence that the Petitioner engaged in objectionable list-keeping where the evidence failed to establish that employees knew of such activity. As for the objections attributing misconduct to the Board agents, the evidence similarly fails to establish that the Board agents engaged in objectionable conduct or in any irregularity during the voting process.

After recounting the procedural history, I discuss the parties' burdens and the Board standards for setting aside elections, including the standards for setting aside elections when alleged misconduct is by individuals who are not agents of the party charged with objectionable conduct. Next, I discuss the parties' burden with respect to establishing an agency relationship along with my reasons for finding that the Petitioner's committee leaders are not general agents of the Petitioner. Then I describe the Employer's operation and election schedule. Finally, I discuss each objection.

II. PROCEDURAL HISTORY

The Petitioner filed the petition on October 19. (Bd. 1(a).²) The parties agreed to the terms of an election and the Regional Director for 28 approved their agreement on October 26. (Bd. 1(a).) The election was held on November 8 and 9. (Bd. 1(a).) The employees in the following unit voted on whether they wished to be represented by the Petitioner:

All regular full-time and regular part-time and regular on-call Banquet Bartenders, Banquet Porters, Banquet Servers, Bar/Beverage Porters, Bartenders, Bell Captains, Bell Persons, Beverage Servers, Bus Persons, Concession Workers, Catering Beverage Porters, Cooks, Cook's Helpers, Counter Attendants, Food

² References to the transcripts are designated as "Tr.____," the Employer's exhibits as "ER____," the Petitioner's exhibits as "Pet.____," the Regional Director's exhibits as "Bd.____."

Servers, Gourmet Hosts/Cashiers, Host/Cashiers, IM Porters, Kitchen Runners, Kitchen Workers, Lead Banquet Porters, Lead Counter Attendants, Lucky VIP Attendants, Lucky VIP Bartenders, Pantry Workers, Pantry Workers 11, Resort Guest Room Attendants, Resort Housepersons, Resort Steakhouse Cooks, Resort Suite Guest Room Attendants, Room Runners, Service Bartenders, Sprinters, Status Board Operators, Steakhouse Captains, Stove Persons, Sushi Cooks, Team Member Dining Room Attendants, Turndown Guest Room Attendants, Utility Porters, VIP Attendants, VIP Bartenders, VIP Lounge Bartenders, VIP Servers employed by the Employer at Green Valley Ranch Resort Spa Casino; excluding all other employees, including all front-desk employees, valet parkers, gaming employees (dealers, slot attendants, cage cashiers), inspectresses, engineering and maintenance employees, office clerical employees, confidential employees, and all guards, managers and supervisors as defined by the Act.³

(Bd. 1(a) at fn. 2.) The ballots were counted and a tally of ballots was provided to the parties. (Bd. 1(a).) The tally of ballots shows that out of approximately 833 eligible voters, 571 ballots were cast for the Petitioner, and that 156 ballots were cast against representation. (Bd. 1(a).) There were three void ballots and three non-determinative challenged ballots. (Bd. 1(a).) Thus, a majority of the valid ballots were cast in favor of representation by the Petitioner.

Objections were timely filed. The Regional Director for Region 28 ordered that a hearing be conducted to give the parties an opportunity to present evidence regarding the objections. (Bd. 1(a).) On November 30, the General Counsel issued an order transferring the instant case from Region 28 to Region 27. (Bd. 1(e).) As the hearing officer designated to conduct the hearing and to recommend to the Regional Director for Region 27 whether the Employer's objections are warranted, I heard testimony and received into evidence relevant documents on December 5, 7, 8, 11, 12, and 13.⁴

III. THE BURDEN OF PROOF AND THE BOARD'S STANDARDS FOR SETTING ASIDE ELECTIONS

It is well settled that "[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000) (quoting *NLRB v.*

³ In this Hearing Officer's Report on Objections, as in the hearing transcript, all references to "team member" or "team members" refer to employees of the Employer.

⁴ At the hearing, I declined to grant any request for post-hearing briefs; however, I accepted closing arguments as well as any memoranda on points and authorities. In this regard, I accepted the Employer's Memorandum of Points and Authorities dated December 13, the Employer's letter addressed to the Regional Director for Region 28 dated November 28 and the Employer's closing argument. I also accepted the Petitioner's Memorandum of Law received on December 13 and Petitioner's closing argument. References to the Employer's Memorandum of Points and Authority are designated as "ER Br. __," references to the Employer's letter to the Regional Director for Region 28 are designated as "ER RD Ltr. __," and references to the Petitioner's Memorandum of Law are designated as "Pet. Br. __."

Hood Furniture Mfg. Co., 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted)). Therefore, “the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one.” *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005) (citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989)). To prevail, the objecting party must establish facts raising a “reasonable doubt as to the fairness and validity of the election.” *Patient Care of Pennsylvania, Inc.*, 360 NLRB 637, 637 (2014) (citing *Polymers, Inc.*, 174 NLRB 282, 282 (1969), *enfd.* 414 F.2d 999 (2d Cir. 1969), *cert. denied* 396 U.S. 1010 (1970)). Moreover, to meet its burden the objecting party must show that the conduct in question affected employees in the voting unit. *Avante at Boca Raton, Inc.*, 323 NLRB 555, 560 (1997) (overruling employer’s objection where no evidence that unit employees knew of the alleged coercive incident).

A. Legal Standard for Alleged Party Misconduct

In determining whether to set aside an election, the Board applies an objective test. The test is whether the conduct of a party has “the tendency to interfere with employees’ freedom of choice.” *Cambridge Tool & Mfg. Co., Inc.*, 316 NLRB 716, 716 (1995). Thus, under the Board’s test the issue is not whether a party’s conduct in fact coerced employees, but whether the party’s misconduct reasonably tended to interfere with the employees’ free and uncoerced choice in the election. *Baja’s Place, Inc.*, 268 NLRB 868, 868 (1984); see also *Pearson Education, Inc.*, 336 NLRB 979, 983 (2001) (citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970)).

B. Legal Standard for Alleged Third-Party Misconduct

Where misconduct is attributable to third parties, including employees, the Board will overturn an election only if the misconduct is “so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984).

C. Legal Standard for Alleged Board Agent Misconduct

Where misconduct is attributable to a Board agent or a Regional office procedural irregularity, the Board will set aside an election where “the manner in which the election was conducted raises a reasonable doubt as to fairness and validity of the election.” *Polymers*, 174 NLRB at 282; see also *Patient Care of Pennsylvania*, 360 NLRB at 637. The Board has also stated that an election must be set aside “when the conduct of the Board election agent tends to destroy confidence in the Board’s election process or could reasonably be interpreted as impairing the election standards the Board seeks to maintain.” *Sonoma Health Care Ctr.*, 342 NLRB 933, 933 (2004). There is not a “per se rule that representation elections must be set aside following any procedural irregularity.” *St. Vincent Hosp., LLC*, 344 NLRB 586, 587 (2005) (quoting *Rochester Joint Board v. NLRB*, 896 F.2d 24, 27 (2d Cir. 1990)). Thus, the Board “requires more than mere speculative harm to overturn an election.” *J. C. Brock Corp.*, 318 NLRB 403, 404 (1995) (citation omitted).

IV. AGENCY STATUS OF PETITIONER'S COMMITTEE LEADERS

The Employer alleges that the Petitioner's agents, specifically members of the Petitioner's in-plant organizing committee or other pro-Petitioner employees, engaged in objectionable conduct during the critical period and on the days of the election. Thus, there is a question as to whether these committee leaders should be construed as general agents of the Petitioner so that their conduct may legally be attributable to the Petitioner. In answering this question, I first discuss the record evidence regarding the agency status of the committee leaders, followed by a discussion of how agency is established, and conclude with my reasons for determining that the committee leaders are not general agents of the Petitioner.

A. Record Evidence Regarding the Agency Status of Committee Leaders

The Petitioner expanded its organizing campaign in the five months leading up to the election. For instance, in June 2017 the Petitioner opened its Green Valley Ranch (GVR) office located about one and a half miles away from the Employer's property. (Tr. 702; Tr. 764.) The Petitioner also increased the amount of organizers assigned to its organizing campaign. (Tr. 777-780.) In June 2017, the Petitioner employed nine organizers to work on the campaign, then 12 by the summer, and then employed up to 28 organizers by mid-October 2017 up until the election. (Tr. 718; Tr. 777-780.) The Petitioner also organized an in-plant organizing committee comprised of unpaid, volunteer employees of the Employer, whose members were known as committee leaders. (Tr. 623; Tr. 732; Tr. 762.) The committee leaders wore a union button that displayed the union logo and the words "committee leader." (Tr. 230; Tr. 586; Tr. 737-738; ER 6.) From about June 2017 to the election, the in-plant organizing committee's membership increased from about 50 committee leaders to about 60-70 committee leaders. (Tr. 716; Tr. 776.) Petitioner's organizers and the committee leaders both played active roles in the Petitioner's organizing campaign.

The committee leaders were much involved in the Petitioner's organizing efforts. Committee leaders solicited signed union authorization cards, accompanied organizers during house-visits, brought team members to the GVR office, distributed union leaflets, and attended union meetings. (Tr. 222; Tr. 228; Tr. 313-315; Tr. 587-588; Tr. 591; Tr. 735-736; Tr. 762-763; Tr. 768; Tr. 771; Tr. 774.) And to the extent that committee leaders could, they answered team members' questions about attending union meetings, provided information received at union meetings, answered questions about union authorization cards, and provided the location of the Petitioner's GVR office. (Tr. 228-229; Tr. 231; Tr. 740-743.) In June 2017, the Petitioner launched the button-up phase of its organizing campaign when it sought a commitment of a majority of the bargaining unit to openly wear union buttons at work. (Tr. 587; Tr. 764.) During this phase, committee leaders distributed union buttons to other team members or brought other team members to the union office to get a button. (Tr. 764; Tr. 768.) Additionally, during the critical period, specifically after the election dates had been scheduled, committee leaders assisted the Petitioner with its get-out-the-vote campaign. As I discuss in more detail below in Employer Objection 1, the Petitioner gave committee leaders a list of team members' names and their contact information and instructed them to contact the team members on their list and get the team members to commit to vote on a certain date and time. (Tr. 784; ER 1; ER 3.)

The Petitioner did not rely exclusively on the committee leaders in its organizing campaign. The Petitioner's organizers also maintained an active physical presence. For example, during the button-up phase of the organizing campaign, committee leaders brought team members to the GVR office to get a union button. (Tr. 764.) While there, team members met with organizers or attended union meetings led by Petitioner's organizers, who then educated the team members about their Section 7 rights. (Tr. 733-734; Tr. 764-767.) When committee leaders brought team members to the GVR office, organizers met with team members and answered team members' questions or, in some cases, took the team members' photograph to use in its campaign literature. (Tr. 222; Tr. 284; Tr. 309; Tr. 141-146; Tr. 165-167; Tr. 762-763; ER 2.) With respect to campaign literature, the record establishes that during the critical period, the Petitioner published and distributed campaign literature containing portraits of approximately 638 team members—more than half of the bargaining unit. (Tr. 88; Tr. 831; ER 2.) To obtain these photographs, the Petitioner's organizers obtained signed media release forms from each team member. (Tr. 831-838; ER 2; Pet. 2.) International Union Vice President Kevin Kline testified that over 500 team members in the bargaining unit came to its GVR office. (Tr. 734; Tr. 762-763.)

The Petitioner also maintained a constant presence separate and apart from the committee leaders. Specifically, between October 24 and on the days of the election, the Petitioner sent campaign literature via text messages to approximately 500 team members. The Petitioner sent these text messages to team members who had previously opted to receive such messages when they signed a union authorization card. (Tr. 838; Tr. 840-852; Tr. 863-864; ER 2; Pet. 3-8.) The Petitioner also employed two spokespersons, including a communications director, to do press releases and speak on the Petitioner's behalf. (Tr. 829-832; Tr. 855-859; Pet. 10.) Petitioner's communications director also met and prepared team members for press opportunities and instructed them to speak about their personal stories and not on the Petitioner's behalf. (Tr. 829; Tr. 855.)

B. Legal Standard for Agency Status

The burden of proving agency is on the party asserting it. *Millard Processing Serv., Inc.*, 304 NLRB 770, 771 (1991), *enfd.* 2 F.3d 258 (8th Cir. 1993), *cert. denied* 510 U.S. 1092 (1994). The agency relationship must be established with regard to the specific conduct that is alleged to be unlawful. *Cornell Forge Co.*, 339 NLRB 733, 733 (2003) (citing *Pan-Oston Co.*, 336 NLRB 305, 306 (2001)). An individual can be a party's agent if the individual has either actual or apparent authority to act on behalf of the party. *Cornell Forge*, 339 NLRB at 733.

The Board applies the common law principles of agency in determining whether an alleged agent is acting with apparent authority on behalf of a party when the alleged agent makes a particular statement or takes a particular action. *Pan-Oston*, 336 NLRB at 305 (collecting cases and other supporting authority). In this regard, the Board has stated:

Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question. [Citation omitted]. Either the principal must intend to

cause the third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such as belief. [Citations committed].

Id. 305-306 (collecting cases). Furthermore, with respect to a principal's liability for the actions of its agent, the Board has stated:

A principal is responsible for its agents' conduct if such action is done in furtherance of the principal's interest and is within the general scope of authority attributed to the agent . . . it is enough if the principal empowered the agent to represent the principal within the general area in which the agent has acted.

Bio-Medical Applications of Puerto Rico, Inc., 269 NLRB 827, 828 (1984).

General union agency will not be established on an employee's status alone as a strong or leading union supporter. *United Builders Supply Co., Inc.*, 287 NLRB 1364, 1365 (1988). "[E]mployee members of an in-plant organizing committee are not, per se, agents of the union." *Mastec N. Am., Inc.*, 356 NLRB 809, 809 (2011) (citations omitted). In fact, "the Board 'will not lightly find an employee 'in-plant organizer' to be a general agent of the union.'" *Id.* (quoting *S. Lichtenberg & Co.*, 296 NLRB 1302, 1314 (1989)).

C. Recommendation

The Employer failed to prove that the committee leaders are general agents of the Petitioner. Foremost, there is no evidence that the Petitioner held any of the committee leaders out as its spokesperson, did anything to place them in a position of importance, or did anything that would give them general authority. Furthermore, the Employer has not demonstrated that the committee leaders had apparent authority because it has not shown any Petitioner conduct that could have given other team members reason to believe that the committee leaders were acting on the Petitioner's behalf. On this record, approximately 50-70 committee leaders distributed literature and union buttons, solicited signatures on authorization cards, and talked to their fellow employees about the union or the election. However, this alone is insufficient to confer them with general authority. Indeed, the Board has held that such activities are insufficient to make employees general agents of the union. *Mastec N. Am.*, 356 NLRB at 809-810; *Foxwoods Resort Casino*, 352 NLRB 771, 771 (2008) ("[T]he Board has found activities such as distributing literature, soliciting signatures on authorization cards, and talking to fellow employees about the union insufficient" to establish general agency); *Advance Products Corp.*, 304 NLRB 436, 436 (1991) (same); *United Builders Supply*, 287 NLRB at 1365 (same).

The Board has found in-plant organizing committees to be general agents of the union where they were substantially involved in the election campaign in the absence of union representatives. *E.g.*, *Bio-Medical of Puerto Rico*, 269 NLRB at 827-828 (finding two employees were union agents where the evidence showed, *inter alia*, that union officials failed to disassociate the union from the employees' actions, allowed the employees to speak on behalf of the union at meetings held by the union for employees, and allowed them to make special

appearances with union officials at election functions). The Board has also found in-plant organizing committees to be general agents of the union when they serve as the primary or only conduit for communication between the union and other employees. *Bristol Textile Co.*, 277 NLRB 1637, 1637 (1986) (finding an employee was a union agent where he was the only conduit for communication between the union and other employees). Neither of those conditions exists here. Rather, the record establishes that the Petitioner maintained a substantial presence throughout its organizing campaign. In this regard, the Petitioner began its campaign with nine organizers and then increased that number to 28 organizers by the time of the election. Additionally, the Petitioner opened the GVR office near the Employer's property, where organizers met with approximately 500 team members—more than half of the bargaining unit. The record further establishes that Petitioner's organizers communicated directly with team members. For instance, Petitioner's organizers led union meetings, met with team members at the union office, and sent campaign literature via digital means to more than 500 team members during the critical period. The foregoing establishes that the Petitioner not only maintained a substantial presence throughout the campaign but also maintained a presence separate and apart from the committee leaders. This is so especially where the Petitioner had two spokespersons to speak on the Petitioner's behalf. Based on the foregoing, I do not find that the committee leaders are general agents of the Petitioner.

I have determined that the committee leaders are not general agents of the Petitioner. Accordingly, I will apply the standard for alleged third-party misconduct for each objection involving alleged misconduct by committee leaders.⁵ *Crestwood Convalescent Hosp.*, 316 NLRB 1057, 1057 (1995) (applying the standard for third-party misconduct to members of the in-plant organizing campaign who were found not be the union's agents).

V. THE EMPLOYER'S OPERATION AND ELECTION SCHEDULE

The Employer operates a resort, spa and casino in Henderson, Nevada. (Tr. 771; ER 4-5.) The election was held in the Employer's property in a banquet room called El Cielo 2. (ER 4-5.) The election was held over the course of two consecutive days on Wednesday, November 8 and Thursday, November 9. The polls were open at the same time on both days as follows: (1) a morning session from 6 a.m. to 9 a.m.; (b) a mid-morning/afternoon session from 11 a.m. to 2 p.m.; and (c) an evening session from 4 p.m. to 7:00 p.m. (ER 4-5.) The Employer and the Petitioner had three observers present at all six voting sessions. (Tr. 683.)

VI. THE EMPLOYER'S OBJECTIONS AND MY RECOMMENDATIONS

The order directing hearing in this matter instructs me to resolve the credibility of witnesses testifying at the hearing and to make findings of fact. Unless otherwise specified, my summary of the record evidence is a composite of the testimony of all witnesses, including in particular testimony by witnesses that is consistent with one another, with documentary evidence, or with undisputed evidence, as well as testimony that is uncontested. Omitted

⁵ I do, however, find that the committee leaders are special agents of the Petitioner with respect to their role during Petitioner's get-out-the-vote campaign as I explain in Employer Objection 1, *infra*.

testimony or evidence is either irrelevant or cumulative. Credibility resolutions are based on my observations of the testimony and demeanor of witnesses and are more fully discussed within the context of the objection related to the witnesses' testimony.

Objection 1: Petitioner Distributed Election Day Sign Up Sheets to Committee Leaders, Who Then Directed Other Team Members That They Must "Sign Up" to Vote on a Specific Voting Session and That They "Must Vote 'Yes' for the Union"

A. Record Evidence⁶

The Employer presented six witnesses in support of its first objection. International Union Vice President Kevin Kline testified about the creation, scope and use of documents labeled "Election Day Sign Up" by the Petitioner and the committee leaders. Committee leaders Alejandra Lopez and Osmani Diaz testified about the instructions a Petitioner's organizer gave to them about the use of these documents. They also testified about the conversations each had with other team members pursuant to the organizer's instruction. Employer's observers Cristina Herescu, Dale Shaw and Tim Williams testified about conversations each had with a committee leader or committee leaders with respect to a document labeled "Election Day Sign Up."

1. Creation, Scope and Use of the Election Day Sign Up Sheets

The Petitioner launched a get-out-the-vote campaign during the critical period. (Tr. 708; Tr. 709-727; Tr. 747-750; Tr. 758-762; Tr. 780-786; ER 1; ER 3.) In so doing, the Petitioner prepared documents labeled "Election Day Sign Up" (or "sign-up sheets"). (ER 1; ER 3.) The sign-up sheets contained the following information: on the left of the page, a list of team members' names and their contact information; and on the right of the page, the election schedule by date and time. (ER 1; ER 3.) The Petitioner prepared these sheets using its own records; that is, Petitioner obtained the team members' contact information from the team members themselves. (Tr. 725-726.) More specifically, the Petitioner obtained team members' contact information from those who had previously signed union authorization cards. (Tr. 326-327; Tr. 725-726.) The Petitioner's get-out-the-vote campaign did not target all eligible voters, however. Rather, it targeted approximately 568 team members whom the Petitioner believed

⁶ During the direct examination of Employer's observer Cristina Herescu, it became apparent that the Employer sought to litigate the showing of interest. (Tr. 77-82; Tr. 201-204.) Accordingly, I ruled that the elicited testimony was irrelevant to the issues set for hearing. Moreover, relying on the Board's decision in *Precision Products Grp.*, 319 NLRB 640, 641 (1995), I concluded that as the hearing officer I lacked the authority to "consider issues that are not reasonably encompassed within the scope of the objections that the Regional Director set for hearing." Here, none of the objections allege that the Petitioner or its agents threatened, misled or otherwise coerced employees into signing union authorization cards.

Furthermore, the Board will not consider allegations of misconduct unrelated to the objections unless the "objecting party demonstrates by clear and convincing proof that the evidence is not only newly discovered but also previously unavailable." *Rhone-Poulenc, Inc.*, 217 NLRB 1008, 1008 (1984). The Employer did not demonstrate that Cristina Herescu's testimony in this regard was previously unavailable.

would vote for the Petitioner. International Union Vice President Kevin Kline testified that the Petitioner targeted team members who already demonstrated union support by openly wearing union buttons at work. (Tr. 275-276; Tr. 571; Tr. 717; Tr. 783).

The Petitioner's organizers distributed sign-up sheets to approximately 60-70 committee leaders. (Tr. 238; Tr. 274; Tr. 565; Tr. 716; Tr. 720.) For the most part, each committee leader received a sign-up sheet with a unique list of team members' names and their contact information. The Petitioner assigned committee leaders to certain team members based on whether the committee leader had solicited a signed union authorization card from the team member(s) on his or her sign-up sheet; whether the committee leader shared the same language as the team member(s) on his or her sign-up sheet; or whether the committee leader worked in the same department as the team member(s) on his or her sign-up sheet. (Tr. 250-253; Tr. 272; Tr. 565; Tr. 715-726; ER 3.) Some committee leaders received duplicate sign-up sheets, as was the case with Alejandra Lopez and Osmani Diaz. (Tr. 250-253; Tr. 272; Tr. 565; Tr. 715-726; ER 3.)

The Petitioner's organizers also instructed committee leaders what to do with the sign-up sheets. According to International Union Vice President Kevin Kline, the organizers instructed the committee leaders to talk to the team members listed on their sign-up sheets about the election, to inform them of the polling times, to ask them when they planned to vote, to get them to commit to vote on the first day, and to report back to the organizers who on their sign-up sheet had voted. (Tr. 581-584; Tr. 707; Tr. 719-720; Tr. 747; Tr. 783-784.) Kevin Kline further testified that the Petitioner wanted to know who had voted to make sure that all of the Petitioner's 'yes' votes turned out; because if they had not, then the Petitioner's organizers would call them or pay the team members a home visit to remind them to vote. (Tr. 720-724.) The Petitioner's organizers further instructed committee leaders to report back whether a team member declined to share when the team member intended to vote. Kevin Kline testified that the Petitioner wanted this information because if the team member refused to provide it, then the Petitioner would assess that team member as a 'no' vote. (Tr. 784.) Committee leaders Alejandra Lopez and Osmani Diaz corroborated Kevin Kline with respect to the instructions they received from an organizer regarding their respective sign-up sheets. For instance, both Alejandra Lopez and Osmani Diaz testified that when Lisa Mitchell, Petitioner's organizer, handed them a sign-up sheet, she told them to ask the team members on their list when they intended to vote. (Tr. 223-226; 238-239; Tr. 250; Tr. 329; Tr. 565; Tr. 572; ER 3.) Lisa Mitchell further instructed them to report back whether or not a team member said he or she would vote during a certain voting session. (Tr. 263; Tr. 565; Tr. 572; Tr. 581-584.)

2. Committee Leaders Ask Other Team Members About Voting

The record establishes that committee leaders followed the organizers' instructions. First, committee leader Alejandra Lopez credibly testified that she asked one team member on her list when he or she intended to vote. She also asked the team member whether he or she had voted. (Tr. 255; Tr. 261-263; Tr. 265; Tr. 327-328; Tr. 331.) Furthermore, Alejandra Lopez testified that she told organizer Lisa Mitchell that the same team member had voted. (Tr. 269-271.) She also told the organizer who else on her sign-up sheet she observed had voted. (Tr. 269-271.)

Alejandra Lopez was not in the presence of any other team member when she called Lisa Mitchell to tell her who had voted. (Tr. 330-333.) Committee leader Osmani Diaz testified that he talked to at least two team members on his sign-up sheet about when they intended to vote. He further testified that he marked his sign-up sheet to indicate on what date and time these team members said they planned on voting. (Tr. 570-574; Tr. 619-622; ER 3.) Osmani Diaz also added a name at the bottom of his sign-up sheet indicating the name of a team member who had voluntarily told him when she planned on voting. (Tr. 575-578; Tr. 622; Tr. 636-637; Tr. 645-646; ER 3.) Unlike Alejandra Lopez, Osmani Diaz credibly testified that he did not tell Lisa Mitchell when the team members said they planned on voting because he lost his sign-up sheet. (Tr. 572; ER 3.) However, Osmani Diaz testified that he told Lisa Mitchell who on his sign-up sheet had voted. (Tr. 581-584; ER 3.) No evidence was presented that other team members knew that Osmani Diaz had shared this information with Lisa Mitchell. (Tr. 580-583.) The record establishes that these committee leaders asked other team members about voting; however, the record does not establish that these committee leaders showed their sign-up sheets to any of the solicited team members. (Tr. 635; Tr. 659.)

The Employer presented two witnesses who had previously seen a sign-up sheet. For instance, Employer's observer Cristina Herescu testified that she saw a sign-up sheet three days before the election. (Tr. 71-75; Tr. 137-140; ER 1.) She testified that a pro-Petitioner employee showed it to her when he asked her if and when she planned on voting. (Tr. 71-75; Tr. 137-140; ER 1.) The team member told her to write her name on the sign-up sheet to indicate the date and time she intended to vote, which she did. (Tr. 72; Tr. 139.) During this conversation, the team member asked her if she knew whether another team member planned on voting. When she replied that she did not, the team member told Cristina Herescu to ask the team member via text message whether the team member was planning to vote and to allow him to take a picture of the team member's response. (Tr. 140.) That was the extent of their conversation. (Tr. 139-140.) The record does not establish whether Cristina Herescu sent the text message or whether the team member took a picture of the text message. Cristina Herescu testified that she was not asked how she intended to vote. (Tr. 72.)

Employer observer Dale Shaw testified that he also saw a sign-up sheet prior to the election. (Tr. 354-356; Tr. 369-377; ER 1.) Dale Shaw first saw the sign-up sheet when two team members wearing committee leader buttons approached him at the Employer's parking lot to ask him if and when he planned on voting. (Tr. 354-356; Tr. 369-377; ER 1; ER 6.) He recognized his name and the names of other team members on the sign-up sheet. (Tr. 354.) Dale Shaw refused to tell the team members when he planned to vote but asserted that he would. (Tr. 354.) In response, the two team members asked if he was sure he would vote, which he said yes, and that was the end of their conversation. He testified that no one asked him how he intended to vote. (Tr. 373-374.)

The Employer presented three additional witnesses who testified about having had conversations with other team members about voting. First, the Employer's observer Tim Williams testified that prior to the election team members asked him whether he would vote and how he would vote. (Tr. 533.) (The record is not clear as to how long before the election he was

asked.) He testified that he felt harassed by other team members, who wore union buttons, constantly telling him that he had to vote. (Tr. 534.) The Employer did not present evidence that this witness had seen a sign-up sheet. (ER 1.) Next, the Employer called team member Miriam Rivera as a witness. She testified that no one asked her when she would vote, including Osmani Diaz; conversely, she testified that she volunteered when she would vote to Osmani Diaz. (Tr. 635-637.) She credibly testified that she has never before seen a sign-up sheet. (Tr. 635; ER 1.) Third, the Employer called team member Eligio Jauregui as a witness. He also testified that neither a committee leader nor a team member wearing a committee leader button asked him when he planned on voting. He, too, credibly testified that he has never before seen a sign-up sheet. (Tr. 659; ER 1.)

The record establishes that some committee leaders, pro-Petitioner employees, and some employees wearing union committee leader buttons asked other team members if and when they would vote. The record further establishes that committee leaders Alejandra Lopez and Osmani Diaz and, based on International Vice President Kevin Kline's testimony, other committee leaders shared the solicited team members' responses with the Petitioner's organizers. The record does not establish, however, that any of the solicited team members knew that the committee leaders or other soliciting pro-Petitioner employees were sharing their responses with the Petitioner's organizers. Lastly, the record does not establish that any committee leader or Petitioner agent instructed other team members that they must sign-up to vote on a specific voting session or that they "must vote 'yes' for the Union" either during the critical period or on the days of the election. (Tr. 276-277.)

B. Board Law and Recommendation⁷

The record establishes that during the critical period, the Petitioner instructed committee leaders to ask about 568 team members if and when they intended to vote and report their responses to the Petitioner's organizers. In the Petitioner's view, if the solicited team member confirmed to a committee leader that he or she would vote, then the Petitioner could count on the team member's support on the day of the election. In other words, the Petitioner's get-out-the-vote campaign was a means of measuring whether the Petitioner had the continued support among a majority of the bargaining unit, especially where team members whose names appeared on sign-up sheets had previously expressed union support by either having signed a union

⁷ At the hearing, I partially granted the Petitioner's petition to revoke Employer's subpoena *duces tecum* no. B-1-Z-1SXBX served on the Petitioner's Custodian of Records. More specifically, I granted Petitioner's petition to revoke subpoena request no. 1 *in toto*, which sought the production of all sign-up sheets. (Tr. 37-38; Tr. 53; Tr. 688-700; Tr. 716.) The record established that the sign-up sheets identified employees who had signed union authorization cards and also identified employees who had served on the Petitioner's in-plant organizing committee. In light of the Section 7 interests involved, I granted the petition to revoke finding that the need to protect the employees' confidentiality interests protected by Section 7 outweighed the Employer's need to obtain the information to establish its case with respect to the creation, scope and the Petitioner's use of the sign-up sheets, especially where, as here, the Employer was able to do so upon the examination of International Union Vice President Kevin Kline. *Nat'l Tel. Directory Corp.*, 319 NLRB 420, 421 (1995) ("[T]he confidentiality interest of employees who have signed authorization cards and attended union meetings are paramount to the Respondent's need to obtain the identities of such employees for cross-examination and credibility impeachment purposes.")

authorization card or having openly worn a union button. On the other hand, the Employer argues that the Petitioner, through the committee leaders, used the sign-up sheets to monitor whether employees would vote or had voted, thereby creating an unlawful impression of surveillance or impression that the Petitioner was monitoring and maintaining a list of those who had voted.

As an initial matter, the record supports that the Petitioner endowed committee leaders with actual authority to ask team members on the Petitioner's behalf if and when they planned on voting and to report their responses back to the Petitioner. In so finding, I rely on International Union Vice President Kevin Kline's testimony that he instructed the organizers to inform the committee leaders to ask other team members when they planned on voting and to report their responses back to the organizers. This finding is further supported by the testimony of committee leaders Alejandra Lopez and Osmani Diaz regarding the instructions they received from organizer Lisa Mitchell in connection with their sign-sheets. For the same reasons as to how employees who solicit authorization cards are deemed special agents of the union for the limited purpose of assessing the impact of statements made during the solicitation, here, too, are the committee leaders deemed special agents of the Petitioner for the purpose of soliciting information as to if and when team members on their respective sign-up sheets would vote or had voted. *Davlan Eng'g, Inc.*, 283 NLRB 803, 803 fn. 2 (1987). Accordingly, the Petitioner will be deemed responsible for representations or statements made when its committee leaders asked team members on their respective sign-up sheets when they intended to vote or whether they had voted. *Ibid.* For the purposes of this objection only, I examine the committee leaders' conduct under the standard for alleged party misconduct in determining whether or not to set aside the election based on the alleged objectionable conduct. For the reasons that follow, I find that the Petitioner and its committee leaders did not engage in objectionable conduct but rather engaged in non-coercive pre-election polling.

The Petitioner's pre-election get-out-the-vote campaign, including its use of the sign-up sheets, was not a poll of the team members' preferences *per se* (*i.e.*, did not expressly ascertain how team members would vote). Nevertheless, its campaign was still a poll of sentiment meant to measure whether the Petitioner still enjoyed support from a majority of the bargaining unit. This is so where all team members whose names appeared on the sign-up sheets had either signed union authorization cards or openly wore union buttons. *Cf. Glamorise Found., Inc.*, 197 NLRB 729, 729 (1972) (employer's contest calling for voters to estimate the number of 'no' votes they thought would be cast in the election was really an unlawful poll of sentiment). Crediting Kevin Kline's testimony, the record establishes that the purpose behind the use of Petitioner's sign-up sheet and pre-election polling was to ascertain whether or not it could still count on its supporters to turn out and vote for representation by the Petitioner. Thus, under Board law, it is established that non-coercive pre-election polling by a union does not warrant setting aside an election. *J.C. Penny Food Dep't*, 195 NLRB 921, 921 fn. 4 (1972). Indeed, the Board has stated that "it is not objectionable conduct for a union to solicit employees non-coercively to support it and to maintain a written record of how employees respond." *Randall Warehouse of Arizona*, 347 NLRB 591, 595 (2006). Here, the Petitioner's get-out-the-vote

campaign, coupled with its use of the sign-up sheets, amount to nothing more than non-coercive pre-election polling permitted under the Act.

On the other hand, the Board has found a union's interrogation coercive and in violation of Section 8(b)(1)(A) of the Act where there is some additional conduct by the union that made the interrogation coercive. *E.g.*, *Graham Eng'g*, 164 NLRB 679, 695 (1967) (union unlawfully questioned an employee concerning his support for a rival union where the interrogation occurred against the background of the union's threat of reprisals against adherents of the rival union made at a union meeting); *Retail Clerks (Skorman's Miracle Mart)*, 160 NLRB 709, 710 (1966) (union unlawfully questioned employees about their de-authorization activities and threatened to keep them under surveillance); *Stokely-Bordo*, 130 NLRB 869, 873 (1961) (union vice president unlawfully questioned employees about their involvement in dissent union activity in the presence of employer officials and other union representatives). Here, the Employer has not shown that committee leaders questioned team members in a context of threats of reprisal or other coercive conduct. The record shows that pro-Petitioner employees with union buttons and committee leaders simply asked other team members, including Cristina Herescu, Dale Shaw and Tim Williams, if and when they planned on voting.⁸ And although the Employer presented one instance where a team member (Cristina Herescu) was told to mark on a sign-up sheet the date and time she planned on voting, the Board has previously determined that such record-making in the context of polling is not objectionable in the absence of any coercive conduct or threats of reprisal. For instance, in *Springfield Hosp.*, 281 NLRB 643, 692-693 (1986), *enfd.* 899 F.2d 1305 (2d Cir. 1990), the judge, with the Board's affirmation, held that the union did not engage in objectionable conduct during the pre-election campaign when pro-union employees engaged other employees in conversations about the union and maintained several charts reflecting the extent of its support among the employees. *Id.* In that case, if the union's organizers and the pro-

⁸ Employer's observer Cristina Herescu testified that a team member *told* her to fill out the sign-up sheet. (Tr. 73; Tr. 139.) Relying on her choice of words, the Employer argues in its Memorandum of Points and Authorities that the team member coerced her into completing the sign-up sheet and then *told* her to ("or demanded that she") text another team member to ask if and when the latter planned on voting. (ER Br. 6.) Although the word "told" has, at times, connotations of obligation, requirement and coercion, I do not find that is what her testimony conveyed here. In so finding, I note that Cristina Herescu testified to a conversation she had with a team member in Spanish—a language she admitted she is not fluent in—and translated it into English—her second language. (Tr. 155-156; Tr. 162-164.) Considering that true connotations get lost in translation, and given the witness's demeanor and the nature and brevity of the conversation she had with the team member about the sign-up sheet, which was absent of any threats of reprisals, I find that there was no coercion. Accordingly, I refuse to find that the team member *told* her to sign the sign-up sheet, that is, required, ordered or obligated that she do so.

Additionally, I find that Tim Williams was not unlawfully interrogated when he was asked by pro-Petitioner employees if he would vote in the election in the absence of any threats or coercion. In this regard, Tim Williams testified that he felt "harassed" when pro-Petitioner employees asked him on a daily basis whether he would vote. Tim Williams chose the word "harassed" to describe how he felt by the pro-Petitioner's persistence. Based on his demeanor during this specific testimony, I note that his choice of words expressed feelings of "annoyance" by the pro-Petitioner employees' conduct. Absent any threats or other coercive statements, "the Act allows employees to engage in persistent union solicitation even when it annoys or disturbs the employees who are being solicited." *Ryder Truck Rental, Inc.*, 341 NLRB 761, 761 (2004) (citations omitted), *enfd.* 401 F.3d 815 (7th Cir. 2005).

union employees determined that the employee was for a union, the pro-union employees put a star next to his or her name; and if the employee was against the union, the employee's name was yellowed-out. *Id.* Because there was no showing that the union and its pro-union employees engaged in any coercive conduct when recording employees' sentiments on charts, the judge overruled the employer's objection. *Id.* Here, as in *Springfield Hosp.*, the Employer has not presented any evidence that the Petitioner's committee leaders coerced any employee, including Cristina Herescu and Dale Shaw, into marking the sign-up sheet to indicate when they planned on voting. As in *Springfield Hosp.*, the Petitioner's agents asking eligible voters if and when they planned on voting and recording their responses on a sign-up sheet, standing alone, amounted to non-coercive union polling permissible under the Act. Accordingly, I overrule Employer Objection 1.

Employer Objection 1 also alleges that the Petitioner's agents instructed employees that they "must sign-up to vote" and "must vote 'yes' for the Union." There is no evidence that Petitioner's agents, including the committee leaders, required employees to sign a sign-up sheet or sign-up to vote on a particular voting session, let alone were told that they "must vote 'yes' for the Union." Because the objection is unsubstantiated, I similarly overrule the objection.

Objection 2: The Union's Agents Escorted Groups of Eligible Voters to the Voting Room

Objection 3: The Union's Agents Escorted Voters to the Voting Room One-At-A-Time and Departed Only After the Voter Entered the Voting Room

A. Record Evidence

The evidence in support of the Employer Objections 2 and 3 primarily rests on the testimonies of Employer's observers Cristina Herescu, Dale Shaw, Roland Vanderburg, Marshall Tresaugue, Anthony Rios and Tim Williams. The Employer also called two committee leaders, Alejandra Lopez and Osmani Diaz, and team member Eligio Jauregui who each testified how they were accompanied by another team member into the polling room.

Cristina Herescu served as an Employer observer during both morning and evening sessions of the election. (Tr. 59; Tr. 98.) In direct examination, she generally testified that throughout the election, she witnessed team members bring other team members into the polling room, or in her words, witnessed team members showing other team members where the polling room was. (Tr. 65-66.) In cross-examination, however, she testified that she witnessed one instance where a team member at the front of the polling room's doors gestured to other team members where the polling room was. (Tr. 134-135; Tr. 168-174; Tr. 176.) Cristina Herescu was unable to identify the team member by name but recognized that this team member had already voted earlier. She also testified that the team member wore union buttons but did not identify what kind of buttons he wore. (Tr. 135-136; Tr. 168-174.) Moreover, Cristina Herescu did not identify how many voters were "escorted" by this team member. Beyond gesturing to other voters where the voting room was, the team member did not engage in any other conduct and left

the polling area once the other team members entered the polling room.⁹ (Tr. 174.) Cristina Herescu further testified in cross-examination that she observed a couple of times when team members, who had already cast a ballot, waited outside the polling room for another team member to finish casting a ballot. (Tr. 126-127.) The witness did not identify whether these team members were committee leaders or how long these individuals waited outside the polling room.

Dale Shaw served as an Employer observer during both evening voting sessions. (Tr. 351-352.) He testified that on two or three occasions, a Board agent told individuals who were standing by the polling room's entry doors that they would have to stand to the right or left of the doors and that those individuals complied. (Tr. 367.) No testimony was elicited as to whether these individuals were voters waiting in line to vote or how long these individuals remained, if at all, near the polling area. Beyond remaining near the polling area to the point that a Board agent had to tell them to stand to the either the right or left of the doorway, these individuals did not engage in any other conduct. (Tr. 367.)

Marshall Tresaugue served as an Employer observer during the mid-morning/afternoon and evening voting sessions on the first day of the election. (Tr. 440.) He testified that he repeatedly witnessed the same pro-union team members walking other people to the polling room's doors.¹⁰ (Tr. 448.)

Roland Vanderburg served as an Employer observer during both morning voting sessions. (Tr. 393-394.) In direct examination, he generally testified that he witnessed people directing others into the polling room and heard the words, "this is where you go." (Tr. 398; Tr. 409.) In cross-examination, however, he testified to two specific instances of this conduct, one at each voting session. (Tr. 408-411.) As for the first instance, he witnessed an individual stand by the polling room's doors directing other individuals into the room. (Tr. 408-409.) The individual remained by the entrance door until he or she was asked by a Board agent to leave. (Tr. 398; Tr. 409.) No testimony was elicited as to how long this individual stood by the polling room's doors, nor how many other individuals he or she directed to the polling room. As for the second instance, he witnessed a woman near the polling room's entrance show two voters where the

⁹ A conflict in Cristina Herescu's testimony emerged in re-direct examination. (Tr. 174-176.) In re-direct examination, she testified that the alleged escort entered the voting room at the same time as the other voters whom he directed into the voting room, thereby contradicting her testimony in cross-examination that she had recognized the team member as having voted earlier that morning. (Tr. 134.) Cristina Herescu further testified during re-direct examination that the alleged escort did not enter the voting room but instead waited outside the voting room. She did not specify for how long the team member waited, nor did the Employer ask. In my view, the conflict in her testimony was the result of confusion on the witnesses' part. Consequently, I do not credit Cristina Herescu's testimony that the alleged escort waited outside the polling room when the voters entered the polling room. Rather, as she testified to in cross-examination, the team member left the polling area when the other team members he led into the voting room entered the polling room. (Tr. 174-175.)

¹⁰ Marshall Tresaugue's testimony in this regard was rather conclusory and lacked any specificity. For example, the record does not establish how many times he saw the same team member walk other voters to the polling room, how he knew that the team members were pro-Petitioner (*i.e.*, they wore union buttons, the team members previously asked him to sign a union authorization card, etc.). For these reasons, as well as the reasons discussed in footnotes 13-16, *infra*, and throughout this report, I do not give much weight to the witness's testimony in this regard.

polling room was and quickly departed thereafter. (Tr. 409-412.) Roland Vanderburg did not identify these individuals; that is, he did not know whether both alleged escorts were either team members, committee leaders, or in any way associated with the Employer. Beyond showing or directing voters to where the polling room was, these unidentified individuals did not engage in any other conduct. (Tr. 409-410.)

Anthony Rios served as an Employer observer during the mid-morning/afternoon voting session on the second day. (Tr. 505.) He testified to only one instance where a voter arrived to the polling room accompanied by another individual. (Tr. 508-510.) According to Anthony Rios, the individual stood in the hallway outside the polling room for as long as it took the voter to cast a ballot; and once the voter exited the polling room, the voter and the individual walked away from the polling area. (Tr. 508-512.) Anthony Rios could not identify who the individual was waiting outside the polling area, let alone identify whether that individual was a team member or in any way associated with the Employer. (Tr. 511.) Beyond waiting outside the polling room, this individual did not engage in any other conduct. (Tr. 512.)

Tim Williams also served as an Employer's observer during the final voting session. He testified that he witnessed team members bring other team members into the polling room. (Tr. 526; Tr. 532.) In this regard, he credibly testified that the team members waited outside the polling room while the voter cast his or her ballot; and once the voter exited the polling room, the team member and the voter walked away from the polling area. Beyond waiting outside the polling room, the team member did not engage in any other conduct while standing outside the polling room. (Tr. 536-537.) His testimony did not establish how many times he witnessed the foregoing conduct.

The Employer called two committee leaders to testify, Osmani Diaz and Alejandra Lopez. Each witness testified that they walked with another team member to the polling room to cast a ballot. Additionally, both witnesses credibly testified that they asked their supervisors to be released to go vote in the election. (Tr. 227; Tr. 343; Tr. 614-615.) They testified that when they expressed a desire to vote, another team member asked if he or she could accompany them because they, too, wanted to vote. (Tr. 279; Tr. 335; Tr. 614-615; Tr. 665.) They further testified that they entered the polling room with a co-worker. (Tr. 334; Tr. 615-616; Tr. 665.) Indeed, witness Eligio Jauregui corroborated Osmani Diaz's testimony in this regard. (Tr. 665.) Alejandra Lopez testified about one instance when, during her break, she was near the hallway near the polling room when another team member stopped her to ask where the polling room was. (Tr. 281.) To help the team member, Alejandra Lopez walked the team member to the polling room and departed as soon as the team member entered the polling room. (Tr. 281-282; Tr. 225; Tr. 335-336.)

There was no evidence that the Petitioner's organizers instructed committee leaders to escort other voters into the polling room. (Tr. 750.)

B. Board Law and Recommendation

The record does not establish the identities of any of the alleged escorts. Nevertheless, the Employer argues that the alleged escorts were Petitioner's agents. On the other hand, the Petitioner argues that the Employer failed to identify a single incident in which the foregoing conduct was attributed to any putative Petitioner agent. And I agree. The Employer's observers testified that either a team member or an unidentified individual showed other voters where the voting room was. The Employer's observers further testified that they witnessed either a team member or unidentified individual accompany a voter to the polling room and waited outside the room while the voter cast a ballot. None of them identified these alleged escorts as either committee leaders or team members wearing committee leader buttons. Consequently, the evidence is insufficient to establish that any of these alleged escorts were Petitioner's agents, let alone committee leaders. The Employer failed to establish that any of the foregoing conduct is attributable to the Petitioner or any of its agents. For this reason, I overrule Employer Objections 2 and 3.

Assuming, without finding, that the alleged escorts were Petitioner's committee leaders, I would nevertheless find that the committee leaders did not engage in objectionable conduct. Because I have determined that the committee leaders are not general agents of the Petitioner, I apply the standard for third-party misconduct to the committee leaders' conduct here. And under that standard, I do not find that the committee leaders' conduct was "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizon*, 270 NLRB at 803. As Alejandra Lopez testified, the record shows that the alleged escorts simply showed other voters where the polling room was. The record further shows that committee leaders Alejandra Lopez and Osmani Diaz were accompanied by one other voter when each decided to vote. The record does not reflect that in any of the foregoing conduct, the committee leaders engaged in any threatening or coercive behavior towards other voters. For foregoing reasons, I also overrule Employer Objections 2 and 3.

Objection 4: The Union's Agents Directed and Instructed Bargaining Unit Employees to Show Their Marked Ballots to the Union's Observers to "Prove" How They Voted

A. Record Evidence

The Employer did not present direct evidence in support of this objection. The record does not show that Petitioner's staff, organizers, committee leaders, or anyone for that matter instructed a voter to show his or her marked ballot to a Petitioner observer to prove how they voted. Rather, the Employer's objection rests solely on the conjecture of four Employer's observers: Cristina Herescu, Dale Shaw, Marshall Tresaugue and Anthony Rios.

Cristina Herescu testified to one incident in support of this objection. She testified that she saw a voter with a ballot in hand, who had already marked her ballot but had not deposited the ballot in the ballot box, walk toward her table. More specifically, she testified that the voter appeared to walk toward the union observer who sat next to her at the observer table. (Tr. 117;

Tr. 123.) The voter did not reach her table because a Board agent stopped the voter and instructed the voter to place the ballot in the ballot box, which the voter did. The voter did not utter anything to the observer, nor did the observer to the voter. Cristina Herescu testified that she could not see how the voter marked his or her ballot. (Tr. 125-126.)

Dale Shaw testified to another incident in support of this objection. In direct examination, Dale Shaw testified that a voter attempted to hand a ballot to a union observer. (Tr. 352-353.) His testimony was rather conclusory in this regard; however, in cross-examination, it was revealed that the voter did not try to hand a ballot to a union observer. Rather, Dale Shaw testified that the voter stepped out of the voting booth and walked toward his observer table with a folded ballot in hand. (Tr. 364-367.) The voter did not reach his table because a Board agent stopped the voter and instructed that the voter place the ballot in the ballot box. Dale Shaw testified that the only thing the union observer told the voter was to place the ballot in the ballot box. He further testified that he could not see how the voter marked his or her ballot because the ballot was folded. (Tr. 365-367.)

Marshall Tresaugue testified that he observed a voter attempt to show his or her marked ballot to a union observer. I do not credit his testimony because it is entirely based on assumption, which he admitted. (Tr. 488.) The basis for this assumption is that he witnessed a voter walk toward an observer table with a ballot in hand. The voter did not walk toward his observer table, however. (Tr. 487; Tr. 491.) The voter did not reach the observer table because the Board agent stopped the voter and then directed the voter to the ballot box. (Tr. 487; Tr. 491.) Marshall Tresaugue did not testify to any misconduct on the part of the union observer who he assumed the voter attempted to show his or her marked ballot. The witness could not recall whether the voter's ballot was folded. Nevertheless, no evidence was elicited regarding whether the witness saw how the voter marked his or her ballot.

Anthony Rios testified that he observed a voter, after having marked his ballot, walk toward his observer table with a folded ballot in hand. Anthony Rios credibly testified that based on the voter's demeanor, the voter looked confused, that is, did not know what to do after marking the ballot so the voter walked over to his table. (Tr. 514-515.) The voter did not reach the table nor did the union observer speak to the voter. (Tr. 516.) There is no evidence that Anthony Rios saw how the voter marked his or her ballot.

B. Board Law and Recommendation

Based on the foregoing evidence, the Employer has failed to prove that the Petitioner or any of its agents directed voters to show their marked ballots to a union observer to prove how they voted. The evidence shows that the Employer rests this objection solely on conjecture of the foregoing witnesses. Moreover, the record fails to show that any voter attempted to show a union observer his or her marked ballot, let alone did so to prove to a union observer how they voted. Because Employer Objection 4 is unsubstantiated, the objection is overruled.

Objection 5: The Union's Agents Directed Voters to Wear Union Buttons When Voting

A. Record Evidence

The Employer did not present any direct evidence that Petitioner's organizers or its committee leaders directed voters to wear union buttons while voting. (Tr. 289; Tr. 612; Tr. 666; Tr. 752.)

The only evidence presented that remotely touches on this objection is the testimony of Employer's observer Marshall Tresaugue. He testified that he witnessed a female team member enter the voting room and ask a Board agent if voters could wear union buttons inside the voting room. (Tr. 445-446; Tr. 465-467.) According to Marshall Tresaugue, the Board agent told her that employees could and she then exited the voting room. Sometime thereafter, Marshall Tresaugue further observed the same female team member enter the voting room along with other voters to vote. (Tr. 465-467.) His testimony did not specify how many other voters entered the room with the female team member. He testified that these voters wore their union buttons; however, his testimony did not establish whether they wore committee leader buttons (ER 6), bartender's union buttons (ER 7), or any other union button. Moreover, his testimony did not establish whether the female team member wore a union committee leader button or a bartender's union button.

B. Board Law and Recommendation

The Employer failed to show that the Petitioner's agents directed voters to wear union buttons when voting as alleged. Accordingly, I overrule Employer Objection 5 because it is unsubstantiated.

Assuming, without finding, that the female team member was a committee leader, I would nevertheless find that she did not engage in objectionable conduct. Further, assuming, without finding, that the female team member had in fact told other team members to wear their union buttons when voting, I would also not find such conduct objectionable. Because I have determined that the committee leaders are not general agents of the Petitioner, I apply the standard for third-party misconduct to the female team member's conduct. And under that standard, her conduct was not so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible. *Westwood Horizon*, 270 NLRB at 803. This is so considering that the Board has long held that it is not objectionable conduct for employees to wear union buttons when voting. *Furniture City Upholstery Co.*, 115 NLRB 1433, 1434-35 (1956) (holding that the wearing of union buttons by participants in an election is not prejudicial to the fair conduct of an election.) For the foregoing reasons, Employer Objection 5 is further overruled.

Objection 6: The Union's Agents Patrolled the Hall Immediately Adjacent to the Voting Room in the "No Electioneering" Area and Frequently Looked Inside, Maintaining an Intimidating Physical Presence Around the Voting Room

and Demonstrating that the Union was Monitoring Who Had Voted in the Election

A. Record Evidence

The record does not establish whether the Board agents delineated a specific no-electioneering area. In these circumstances, the Board applies its rules against electioneering only to the customarily proscribed area, *i.e.*, “at or near the polls.” *See Bally’s Park Place, Inc.*, 265 NLRB 703, 703 (1982). In this case, the election was held in a banquet room called El Cielo 2 that was adjacent to a long hallway. (Tr. 431-432; Bd. 2.) A Starbucks, the hotel lobby and lobby bar are located at one end of the hallway, about 20-25 feet away from the entrance to the polling room. (Tr. 431-432.) At the opposite end of the hallway is a juncture located about 30 feet from the entrance to the polling room. (Tr. 432-438; Bd. 2.) At this juncture, one path down the hallway leads to an employee entrance to the back of the house of the Employer’s property. Another path leads down another hallway and another path leads to conference rooms and restrooms. On this record, I find that the no-electioneering area extended to the hallway immediately next to the entrance to the polling room.

The Employer does not contend that any individual engaged in any electioneering at or near the polling area, specifically in the hallway adjacent to the polling room. Indeed, there is no evidence that any individual engaged in electioneering. Rather, the Employer alleges that Petitioner’s agents, specifically committee leaders, patrolled the hallway creating an intimidating physical presence around the polling room. In support of its objection, the Employer relies on the testimony of four witnesses as discussed below.

Employer observer Cristina Herescu initially testified she saw team members walking past the polling room and, in doing so, looked inside. (Tr. 64-66.) In cross-examination, however, she specifically testified that at both morning voting sessions, she observed at least four or five team members on separate occasions walk back and forth down the hallway. (Tr. 128-130.) Beyond walking down past the polling room’s doors and looking inside the polling room, these team members did not engage in any other conduct. (Tr. 130; Tr. 161-162.) No evidence was presented as to how much time elapsed between the first time Cristina Herescu saw a team member walk past the polling room and the second time she saw that same team member walk past the polling room in the opposite direction. She did not identify whether these team members were committee leaders or wore committee leader buttons.

Employer’s observer Marshall Tresaugue testified that he witnessed team members “patrol” the hallway in the mid-morning/afternoon voting session on the first day of the election. (Tr. 448-449.) He initially testified that he was not sure whether these team members were pro-union employees, but in cross-examination, he contradicted himself and asserted that they were pro-union employees. (Tr. 448-449; Tr. 462-463.) In explaining what he saw, Mitchell Tresaugue testified that team members were simply walking back and forth down the hallway and looking inside the polling room as they walked by. (Tr. 449; 464-465.) He testified that none of these team members stopped in front of the polling room’s doors. Although he testified that he witnessed team members walk down the hallway, he recognized two team members as being

pro-Petitioner employees because they previously talked to him about joining the union. (Tr. 463-464.) Beyond walking past the hallway, these team members did not engage in other conduct. (Tr. 464-465.) Furthermore, Marshall Tresaugue did not identify whether these team members were committee leaders or wore committee leader buttons.

Employer observer Dale Shaw testified that on two or three separate occasions, a Board agent told an individual to step away from the entrance of the polling room's doors. (Tr. 353; Tr. 367.) The individuals complied with the Board agent's instruction. No testimony was elicited as to whether these individuals were team members or committee leaders.

Employer observer Tim Williams testified that, during the final voting session, he witnessed about ten team members on separate occasions walk down the hallway past the polling room's doors and, in doing so, looking inside. (Tr. 530-532; Tr. 538-540.) He saw these team members walk down the hallway only once; that is, they did not walk back down the hallway in the opposite direction passing by the polling room's doors a second time. (Tr. 532.) Beyond walking by the polling room and looking inside, these team members did not engage in any other conduct. (Tr. 539-540.)

B. Board Law and Recommendation

The record does not establish the identities of any of the alleged patrollers. Nevertheless, the Employer argues that the unidentified patrollers were committee leaders and that they engaged in such conduct to monitor and ascertain whether team members had voted. (ER Br. 9.) In doing so, the Employer argues, the Petitioner created the impression that the team members' decision to vote was under surveillance by Petitioner's agents, thereby interfering with their Section 7 rights. (ER. Br. 9.) On the other hand, the Petitioner argues that the Employer failed to prove the unidentified patrollers were in fact Petitioner's agents, let alone anyone whose conduct could be attributable to the Petitioner. And I agree.

The evidence is insufficient to establish the identities of the alleged patrollers. Furthermore, the evidence is insufficient to establish that the alleged patrollers were in fact committee leaders. Rather, the record shows that the alleged patrollers were team members, whose conduct I cannot attribute to the Petitioner. Accordingly, consistent with the witnesses' testimony, these "patrollers" were team members whose union sentiments are generally unknown with the exception of the two team members whom Marshall Tresaugue recognized as pro-Petitioner employees. Because there is insufficient evidence to establish that the alleged patrollers were the Petitioner's agents, I overrule Employer Objection 6.

Assuming, without finding, that the alleged patrollers were committee leaders and/or pro-Petitioner employees, I would nevertheless find that the committee leaders did not engage in objectionable conduct. Because I have determined that the committee leaders are not general agents of the Petitioner, I will apply the standard for third-party misconduct to the committee leaders' conduct here. Here, the record shows that the committee leaders simply walk to and fro the hallway past the polling room and, in doing so, looked inside. This conduct alone is insufficient to establish that it was so aggravated as to create a general atmosphere of fear and

reprisal rendering a free election impossible. *Westwood Horizon*, 270 NLRB at 803. This is so considering that no single alleged committee leader maintained a continued presence in or near the polling room or engaged in any conduct other than looking inside the room as they walked by. *Cf. Performance Measurements Co., Inc.*, 148 NLRB 1657, 1659 (1964) (holding that an employer engaged in objectionable surveillance by the president's "continued presence" near the polling area); *Electric Hose & Rubber Co.*, 262 NLRB 186, 216 (1982) ("Walking past the polling area without stopping, cannot, standing alone, be construed as employer surveillance."). For the forgoing reasons, I also overrule Employer Objection 6.

Objection 7: The Union's Agents Instructed Voters Waiting Outside the Voting Room Where to Stand and When to Enter the Voting Room

A. Record Evidence

The record is devoid of any evidence that an admitted agent of the Petitioner, committee leader, or any team member for the matter instructed voters waiting outside the voting room where to stand or when to enter the voting room. Moreover, there is no evidence that voters waited outside the voting room before entering the voting room.

Rather, the record shows that the Board agents were in control of the voting process. For instance, Cristina Herescu, an Employer's observer during both morning and evening voting sessions, testified that four Board agents were present in the polling room. (Tr. 114.) She further testified that the Board agents directed voters to one of the three observer tables, distributed ballots to the voters, directed voters to voting booths and instructed voters to deposit their ballots in the ballot box. (Tr. 114.) Indeed, she testified that a Board agent remained near the observer tables and that this Board agent assisted the observers with identifying voters or, in some instances, instructed voters to step back from the observer table. (Tr. 119-122.) Employer's observer Roland Vanderburg credibly testified that the Board agents were in control of the voting process during both morning sessions of the election. (Tr. 401-403.) He, too, testified that there was a Board agent who greeted voters at the door, another Board agent near the challenge table, a Board agent directing voters to the appropriate observer table, and other Board agents floating around the polling room. (Tr. 401-403; Tr. 415-429; Bd. 2.) Marshall Tresaugue, the employer observer for the afternoon and evening voting sessions on the first day, testified in a similar fashion. (Tr. 451-474.) Similarly, Tim Williams, the Employer's observer for the final voting session, corroborated the foregoing testimony. (Tr. 540-547.)

B. Board Law and Recommendation

The Employer has the burden of establishing that the conduct alleged in Employer Objection 7 occurred. Because the Employer has not substantiated its objection, Employer Objection 7 is overruled.

Objection 8: The Union's Agents Maintained a List of Who Had Voted

A. Record Evidence¹¹

The record does not establish that the Petitioner engaged in objectionable list-keeping at or near the polls, let alone near the Employer's property. In this regard, the Employer did not present any evidence that any organizer, observer, committee leader or team member engaged in list-keeping or engaged in any conduct that could be interpreted as list-keeping, such as checking names off a list, at or near the polls. Rather, relying on the testimony of International Union Vice President Kevin Kline and committee leaders Alejandra Lopez and Osmani Diaz, the Employer establishes that on the days of the election, the Petitioner kept track of who of its union supporters had voted, as discussed below.

During the days of the election, the Petitioner reminded its supporters to turn out and vote. To do so, Kevin Kline testified that Petitioner's organizers instructed committee leaders to report to them who on their sign-up sheets had voted. The organizers further instructed committee leaders to ask those team members if they had voted. The record establishes that the committee leaders did just that. Indeed, committee leaders Osmani Diaz and Alejandra Lopez testified that, on the days of the election, they informed organizer Lisa Mitchell who had voted. (Tr. 268-271; Tr. 580-582; Tr. 718-726.) They did so, however, not in the presence of any other voter. Similarly, Employer's observer Cristina Herescu testified that a pro-Petitioner team member wearing a committee leader button asked her whether she had voted.¹² (Tr. 91.) Kevin Kline further testified that based on the committee leaders' information, the Petitioner determined who of its supporters had not yet voted and called them to remind them to do so. (Tr. 720-724.) Kevin Kline testified that this "data," which for all intents and purposes was an active list of those who had voted, was stored electronically at the Petitioner's office and never printed. (Tr. 724.) No evidence was presented that the committee leaders or any team member knew that the Petitioner was keeping this "data."

B. Board Law

In Board cases dealing with objectionable list-keeping, the focus on the inquiry must be on what voters observed and could reasonably believe. Indeed, in *Days Inn Mgmt. Co.*, 299 NLRB 735, 737 (1992), the Board stated:

It is well settled that the only list of voters that may be maintained in Board-conducted elections is the official voter eligibility list used to check off the names of voters as they receive their ballots. The keeping of any other list of individuals who have voted is prohibited and is grounds in itself for setting aside the election *when it can be shown or inferred from the circumstances that the employees knew*

¹¹ As an initial matter, I note that the evidence in support of Employer Objection 8 is related to the evidence in support of Employer Objection 1. Accordingly, I incorporate the relevant record evidence in Employer Objection 1 to the objection here.

¹² The record does not establish when the team member asked Cristina Herescu if she had voted.

that their names were being recorded. And this is so even when there has been no showing of actual interference with the voters' free choice.

(own emphasis added); *see also Southland Containers, Inc.*, 312 NLRB 1087, 1087 (1993) (refusing to set aside an election where two employees kept a written list of employees of who was voting 'Yes' and 'No' but had not shown it to other employees); *Cerock Wire & Cable Grp.*, 273 NLRB 1041, 1041 (1984) (holding that union observer did not engage in objectionable list-keeping) (collecting cases).

C. Recommendation

The record lacks direct evidence that any team member, including the committee leaders themselves, was aware that the Petitioner kept track of who had voted. Nevertheless, the Employer argues that the conduct described above created the impression among voters that the Petitioner, through committee leaders, was both monitoring whether team members had voted and keeping a list of those who voted. (ER Br. 7.) The Employer further argues that voters were aware of Petitioner's list-keeping because: (a) the committee leaders themselves were eligible voters; (b) the committee leaders openly asked other voters whether they voted; and (c) the Petitioner used the list to target those who had not voted, thereby creating the impression that the Petitioner monitored who had voted and who had not. In so doing, the Employer argues, the Petitioner's conduct was inherently coercive and unlawful, regardless if any individual subjectively felt coerced citing *Piggly-Wiggly #011*, 168 NLRB 792, 792-793 (1967) (sustaining objection that petitioner representatives engaged in objectionable list-keeping by stationing themselves in front of each store and admittedly checking off names of voters who entered the polling area) and *Med. Ctr. of Beaver Cnty., Inc., v. NLRB*, 716 F.2d 995, 999 (3d Cir. 1983) (ER Br. 7.) On the other hand, the Petitioner argues that because the Employer has not presented evidence that employees were aware that the Petitioner was maintaining a list and, under extant Board law, such conduct is not objectionable citing *Cross Pointe Paper Corp.*, 330 NLRB 658, 622 (2000) (union observer engaged in objectionable list-keeping), *Indeck Energy Serv.*, 316 NLRB 300, 301 (1996) (Board refused to set aside election where there was no evidence that Petitioner's observer or representative actually kept a list and that the employees even suspected that their names were being recorded), *Days Inn Mgmt*, 299 NLRB at 737 (chief engineer engaged in objectionable list-keeping by stationing himself at the entrance to the employer's property, greeted voters as they entered, took voter's names, and openly crossed them off his list of potential voters, and then directed them to the elevator to the polling area), and other cases. (Pet. Br. 8-9.)

On this record, I do not find that the circumstances created a reasonable belief among team members and committee leaders that the Petitioner was engaging in objectionable list-keeping or even keeping a list for that matter. Foremost, I note that the cases cited above are inapposite to the facts here because those cases involve allegations that either a party agent or other individuals engaged in objectionable list-keeping *at or near the polls*. In this matter, there is no evidence that the Petitioner's organizers, committee leaders or any individual engaged in list-keeping at or near the polls. Nevertheless, the Employer established that on the days of the

election the Petitioner kept an electronic list of those who had voted based on the information reported by the committee leaders. The Employer contends that the circumstances here warrant a finding that team members reasonably believed that the Petitioner was keeping such a list because the committee leaders themselves were voters, the committee leaders asked other employees whether they had voted, and the Petitioner targeted the voters who had not to remind them to vote. However, I disagree because there is no evidence that any of the team members and committee leaders had the slightest suspicion that the Petitioner was engaging in such list-keeping. In so finding, I note that the organizers' instructions to the committee leaders, as explained by International Union Vice President Kevin Kline and committee leaders Alejandra Lopez and Osmani Diaz, lack the slightest reference to soliciting who had voted for the purposes of maintaining said list. Moreover, when the committee leaders themselves asked other team members if they had voted, there was no mention of a list, let alone a statement that the committee leaders wanted this information to report it to the Petitioner.

Rather, the circumstances suggest that team members and the committee leaders themselves had a reasonable belief that on the days of the election, the Petitioner was engaging in electioneering away from the polls. More specifically, the Petitioner was urging its union supporters to turn out and vote for representation by the Petitioner. This is so considering that the team members who were targeted by the Petitioner's organizers and committee leaders were team members who had previously expressed union support. And because the Employer did not present evidence that the Petitioner's organizers or the committee leaders themselves engaged in any coercive or threatening conduct when they asked team members if they had voted or when they reminded them to vote, I find that the foregoing conduct amounted to unobjectionable electioneering away from the polls. *Cf. Comcast Cablevision of New Haven, Inc.*, 325 NLRB 833, 833 fn. 2, 838 (1998) (Board adopted hearing officer's finding that union did not engage in objectionable conduct by simply and briefly urging voters to vote for the union as they entered and left the facility on election day); *see also Boston Insulated Wire*, 259 NLRB 1118, 1118-19 (1982).

Because the Employer failed to prove that team members and committee leaders themselves knew that the Petitioner kept a list of those who had voted, in accordance with the aforementioned Board cases, I overrule Employer Objection 8.

Objection 9: Voters Openly Carried Cell Phones into the Voting Room and Voting Booths and the Board Agents Failed to Instruct Voters That Use of Such Devices Was Restricted

The Employer's objection is two-fold. First, the Employer objects to voters having openly carried cell phones into the polling room and voting booths. Second, the Employer contends that the Board agents failed to instruct voters that use of such devices was restricted.

A. Record Evidence

The Employer presented evidence that some voters entered the voting room and voting booths with their cell phones in hand. Employer's observers Cristina Herescu and Marshall

Tresague primarily testified in support of this objection. (Tr. 114-116; Tr. 445; Tr. 482.) No evidence was elicited regarding how many voters out of the approximately 733 who cast a ballot entered the voting room or voting booths with a cell phone or other mobile device in hand. And other than openly carrying their cell phones, no evidence was presented that any of the voters used his or her mobile device to take pictures, record, answer a call, or type while in the voting room, either in the presence of or in the absence of other voters.

The Employer further alleges the Board agents failed to instruct voters that use of such devices was restricted. However, two Employer's observers refuted this allegation. First, Cristina Herescu credibly testified that Board agents told voters to enter the voting booths without their phones in hand, and that at other times, Board agents instructed voters to put their phones in their pockets. (Tr. 115-116.) As she was an Employer observer for four out of the six voting sessions (both morning and evening sessions), I conclude that the Board agents instructed voters to put their cell phones away throughout both days of the election. The second witness, Marshall Tresague, similarly testified that the Board agents instructed voters to put their cell phones away, albeit only during the evening session when he acted as an observer. (Tr. 445.)

B. Board Law and Recommendation

I overrule Employer Objection 9 to the extent that the objection alleges that the aforesaid voters engaged in objectionable conduct. The record does not establish a single instance when a voter used his or her cell phone or other mobile device while in the polling area. Consequently, I do not find that the mere open possession of a cell phone or other mobile device, standing alone, created "a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons*, 270 NLRB at 803.

Contrary to the Employer's objection, the record establishes that Board agents did not fail to instruct voters to put their phones or other mobile devices away. Accordingly, Employer Objection 9 is unsubstantiated and it is, therefore, overruled.

Objection 10: On at Least Two Occasions, Voters Lingered and Conversated Near the Ballot Box and/or Beverage Station

A. Record Evidence

The Employer did not present evidence that voters lingered near the ballot box. However, it did present evidence that on two separate occasions a pair of voters grabbed beverages from the beverage table located at the back of the voting room. The beverage table was stationed at the opposite end of where the ballot box was placed. (Tr. 109-113; Tr. 415-424; Pet. 1; Bd. 2.) The Employer's objection relies on the testimonies of Employer's observers Roland Vanderburg and Marshall Tresague. Each testified to one instance related to this objection.

First, Roland Vanderburg testified that he witnessed two voters grab a beverage from the beverage station. (Tr. 396.) No testimony was elicited as to which of the morning sessions did this matter occurred at, let alone any evidence regarding how long these voters remained at the

beverage station. No evidence was presented that the pair of voters did anything other than grab a beverage. The record was not clear whether or not there were any other voters present when the pair grabbed a beverage from the beverage station. Roland Vanderburg also testified about what kinds of beverages were available at the beverage station. In this regard, he said that coffee, hot water, tea bags, soda, paper cups and ice were placed on the table. (Tr. 423.)

Second, Marshall Tresaugue testified that he witnessed a pair of voters, who already cast a ballot, stand at the beverage station for about five minutes preparing their beverages. (Tr. 475-477.) I did not find the witness particularly credible on this point.¹³ He further testified that the pair of voters conversed in Spanish while they prepared their beverages. (Tr. 476.) However, the witness could not recount the nature of the voters' conversation. The evidence established that these voters did not engage in any conduct other than talking while preparing their beverages. (Tr. 492.) Moreover, the record is not clear as to whether there were other voters present in the room when the pair prepared their beverages.

B. Board Law and Recommendation

Employer Objection 10 is without merit. The Employer argues that in the two instances when a pair of voters stood by the beverage station and prepared or grabbed beverages, the voters' presence created the impression amongst other voters that their voting activities were being monitored. Contrary to the Employer, I do not find that the foregoing conduct created an objectionable impression of surveillance in the absence of evidence that: (1) other voters were present in the voting room during both instances; (2) that both pair of voters maintained a continued presence beyond the time necessary to grab a beverage or prepare a beverage (*e.g.*, coffee or tea); or (3) that the foregoing voters did anything other than converse while preparing their beverages. Additionally, the Employer does not allege, nor has it presented evidence, that both pairs of voters were committee leaders or putative agents of the Petitioner. Accordingly, under the standard for third-party misconduct, I find that the voters' conduct, without more, did not create "a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons*, 270 NLRB at 803. In light of the aforementioned reasons, Employer Objection 10 is overruled.

¹³ Relevant portions of Marshall Tresaugue's testimony were rather conclusory, speculative, inconsistent and bombastic. For example, in cross-examination, when asked how long the two voters stood by the beverage table, he said "five to ten minutes maybe." (Tr. 476.) Given the apparent uncertainty of his response, when asked again to confirm whether the voters stood at the table for five minutes or ten minutes, he said, "I don't wear a watch either," again evincing, as it was apparent in the witness's demeanor, that he was guessing as to how long the voters remained at the beverage table. (Tr. 477.) Further along this line of questioning, the witness became agitated with proper examination into the reliability and confidence of the witnesses' own memory. As a result, he un-assuredly testified it took the voters five minutes to prepare their beverages. (Tr. 477-478.) ("Let's say 5 so you can get off the question.") See also footnote 10, *supra*, and footnotes 14-16, *infra*. Consequently, I do not credit the witness that the pair of voters remained near the beverage station for five minutes.

To the extent Employer Objection 10 attributes culpability to the Board agents, I find that the Board agents did not engage in objectionable conduct under the relevant standard. On this record, I do not find that the Board agents either destroyed the confidence in the Board's election processes or cast doubt to the fairness and validity of this election by allowing four out of approximately 733 voters to take a beverage from or prepare a beverage at the beverage station. *Polymers*, 174 NLRB at 282; *Sonoma Health Care*, 342 NLRB at 933. In so concluding, I note that the beverage station was at the back of the voting room and away from the ballot box; that there was insufficient evidence to show that these voters maintained a continued presence near the beverage station; that the voters did not engage in any misconduct; and that the record reflects that the Board agents were in control of the voting process at all times. *See* Record Evidence in Employer Objections 7, 9 and 11. For the foregoing reasons, I overrule Employer Objection 10 to the extent it also alleges that the Board agents engaged in objectionable conduct.

Objection 11: An Appropriate Flow of Voters Was Not Maintained, Resulting in Rushed and Unreliable Verifications of Voter Eligibility

A. Record Evidence

It is undisputed that there were three observer tables in the voting room during all voting sessions. It is further undisputed that there were three sets of a union observer and employer observer at each table. During direct examination, the Employer asked employer-observer witnesses to describe the flow of voters entering the voting room. As I discuss in detail below, many of the witnesses described instances when voters either became impatient during the voting process or began pointing to their names on the voter list. No testimony was elicited as to whether or not the Employer's observers, or any other observer for that matter, were unable to verify a voter's eligibility, unable to check names off the voter list, or otherwise faced difficulties performing their duties as an observer.

Cristina Herescu, an Employer observer for four out of six voting sessions, testified that sometimes voter traffic into the voting room ebbed and flowed. (Tr. 61.) She testified that there were ten voters in the room when it was the busiest, typically during the middle of the voting session. (Tr. 118.) She also described three instances when voters became impatient with her when she tried to find their names on the voter list; more specifically, she said that the voters pointed or searched for their names on the voter list. (Tr. 61; Tr. 121.) She asserted that these voters were able to see who else's name had been checked off (*i.e.*, who else had voted). (Tr. 61-62.) Cristina Herescu testified that a Board agent was present at or near the observer table throughout the polling sessions. (Tr. 119-120.) She also testified that the Board agent instructed voters who touched the voter list to stop doing so or directed voters to step back from the observer table. (Tr. 122.) Cristina Herescu did not testify that she was unable to verify a voter's eligibility; rather, she testified that once voters identified themselves by name, she searched for their names on the list and checked their names off the voter list. And in these instances she could not find the voter's name on the voter list, the voter presented identification to the Board agent. (Tr. 119.)

Roland Vanderburg, an Employer's observer during both morning voting sessions, testified that the flow of voters was sporadic. (Tr. 394.) Consistent with Cristina Herescu's testimony, he testified that the greatest number of voters in the room was seven to eight, typically during the middle of the session. (Tr. 403-404.) He, too, described instances when voters became impatient and leaned over the observer table and pointed to their name on the voter list. (Tr. 395; Tr. 404-406.) He described two other instances when voters, who did not check in at his table, became impatient or, as to what he described, annoyed or disturbed with the voting process. (Tr. 397-398.) Roland Vanderburg did not testify that he was unable to verify a voter's eligibility. Instead, his testimony establishes that he was able to do so. In this regard, he testified that he checked names off the voter list as each voter identified himself or herself at his table. (Tr. 395-396.)

Employer observer Dale Shaw testified that the flow of voters during both evening sessions of the election was steady. (Tr. 351-352; Tr. 359-360.) He recalled two instances, one at each voting session, where both he and the union observer had trouble finding a voter's name, so the voter pointed to his or her name on the voter list. (Tr. 352; Tr. 360-364.) And on both occasions, he, the union observer and the Board agent told the voter not to touch the voter list. (Tr. 361-364.) Dale Shaw testified that thereafter, he and the union observer found the voter's name and checked it off. (Tr. 362.) No testimony was elicited from Dale Shaw as to whether or not he was unable to verify a voter's eligibility or otherwise unable to perform the observer's duties.

Employer observer Marshall Tresaugue testified that the flow of voters was sporadic during both mid-afternoon and evening sessions on the first day of the election. (Tr. 441.) He testified that the Board agents processed voters quickly. For instance, he testified that when voters arrived at the polling room's doors, a Board agent asked them for their last names and then directed the voters to one of the three observer tables. From then on, the voters identified themselves to the observers by name, the observers checked their names off the list, and then another Board agent handed the voter a ballot. (Tr. 472-473.) No testimony was elicited from the witness as to whether or not he was unable to carry out the observer's duties or verify a voter's eligibility due to the flow of voters.

Marshall Tresaugue also testified to instances when voters became impatient. (Tr. 442.) In this regard, he said that there were times when a voter, who had more than one last name, leaned over the table to help the observers search for his or her name on the voter list.¹⁴ (Tr. 442.) He further testified that there were several instances, specifically about 20 or 30, when voters who pointed to the voter list also commented that they knew some of the voters on the list,

¹⁴ In cross-examination, he testified that he witnessed at least 50 voters point to their names on the voter list. (Tr. 486.) I do not credit this testimony because the circumstances show that he guessed and was not sure about his testimony. In particular, when he was asked how many voters pointed to their names on the voter list, he initially said, "I don't know. I didn't count," and when asked for an approximation he said, "Fifty maybe." (Tr. 486.) The witness's wavering demeanor during this point in cross-examination is wholly inconsistent with what the witness later on said, "I count everything." (Tr. 489.)

e.g., “I know that guy,” or “That’s my buddy.”¹⁵ (Tr. 442-443; Tr. 451-454.) He also said that a Board agent was near his table when this occurred and instructed the voters to step back and refrain from leaning over the observer table. (Tr. 451-454; Tr. 479.)

Employer’s observer Anthony Rios testified that the flow of voters was mild in the mid-morning/afternoon session on the second day of the election. (Tr. 506.) He credibly testified that there were two or three voters in the voting room every 15-20 minutes. (Tr. 506-510.) He further testified that he was able to carry out his observer’s duties, including verifying a voter’s eligibility along with his union observer counterpart. He, too, recalled two instances when he and the union observer could not quickly find a voter’s name on the voter list, so the voter reached over the table to help them locate his or her name. (Tr. 507; Tr. 516.) In those instances, other voters’ names had already been checked off. (Tr. 507.) Also, in those instances, the Board agent directed the voters to step back from the table. (Tr. 516.)

Tim Williams, an Employer’s observer on the final voting session, testified that a few voters entered the polling room one at a time. (Tr. 526.) He did not see any voters touch the voter list. (Tr. 528.) He said that some voters showed their Employer-issued identification to verify their eligibility. (Tr. 549-552.)

In all the foregoing instances when voters became impatient, the Employer did not prove, nor does the Employer allege, that these voters recorded or kept of list of whose names were checked off the voter list. Moreover, in all the foregoing instances, the evidence does not establish that the impatient voters were committee leaders or any putative agent of the Petitioner.

B. Board Law and Recommendation

As an initial matter, I note that the voting procedure employed by the Board agents was fair, appropriate and conformed to the NLRB Case-handling Manual. In this regard, Section 11322.1 of the NLRB Case-handling Manual, Part Two, Representation Proceedings (January 2017) states that:

The approaching voters, who should by that time have formed a line, should be asked to call out their names, last names first, as they reach the table. They may also be asked for other identifying information, as necessary. . . . Once a voter’s name has been located on the eligibility list, all observers are satisfied as to the voter’s identity and no one questions his/her voting status, each observer at the checking table should make a mark beside the name. . . . Once a voter has been

¹⁵ I do not credit the witness when he said that there were 20 or 30 instances when a voter pointed to the voter list and made the aforesaid remarks. In so doing, I note that, during this point in cross-examination, the witness expressed a lack of confidence in his own memory (*e.g.*, “It happened on several. . . . I’m not that smart, all right? I can’t count that high”). (Tr. 452-454.) And when he was impeached with his own statement, the witness became agitated and defensive toward the examiner (*e.g.*, “I can count as high as you need me to . . .”). (Tr. 453.) Thus, when I asked him to quantify how many times he witnessed the foregoing conduct, he un-assuredly testified to 20 or 30 instances to, in my view, placate the cross-examiner and move on from that line of questioning. (Tr. 454.) (“It happened more than – it probably happened 20, 30 times. A lot going on at the time. . . .”)

identified and checked off, the observers . . . should indicate this to the Board agent, who will then hand a ballot to the voter.

Following the aforesaid guidelines, the record establishes that a Board agent greeted voters at the entrance, asked for their names and then directed the voter to one of three observer tables. At the observers table, the voters lined up and approached an observer table where the voters identified themselves by name. Upon doing so, both observers searched for the voters' names on the voter list and confirmed the eligibility of the voter by checking their name off the list. Once the observers confirmed the eligibility of the voter, a Board agent handed the voters a ballot and then another Board agent directed the voters to one of the voting booths. It was under this procedure that the Board agents processed about 733 voters throughout 18 hours of polling over the course of two days.

In light of the voting procedure employed, the Employer has failed to establish that the flow of voters entering the voting room to vote was either inappropriate or resulted in unreliable verification of voter eligibility. Foremost, I note that the Board agents cannot control the flow of voters entering the polling room absent some agreed-upon voter release schedule. Nevertheless, the Employer's observers testified that the flow of voters was sporadic and, at most, there were ten voters in the voting room voting. Despite this sporadic flow of voters, there was no evidence that any of the observers were unable to identify voters or determine a voter's eligibility. Indeed, none of the Employer's observers testified that they themselves were unable to identify the voter's eligibility because of the flow of voters, especially during the circumstances when some voters got impatient with the voting process by pointing to their names on the voter list.

The Employer failed to substantiate its objection that observers were unable to verify the eligibility of voters because of the flow of voters. Moreover, the Employer has failed to establish that the Board agents engaged in any irregularity during the voting process resulting in unreliable verifications of voters' eligibility. Accordingly, Employer Objection 11 is overruled.

Objection 12: A Union Observer Was Permitted to Serve as an Observer After Having Asked a Board Agent to Read the Ballot to Her, Indicating that the Purported Observer was Illiterate or Suffered Vision Problems

A. Record Evidence

The Employer presented one witness in support of its final objection, Employer's observer Marshall Tresaugue.

Marshall Tresaugue asserted that one of the Petitioner's observers was illiterate. In this regard, he described a conversation he witnessed between a female voter, who had a ballot in hand, and a Board agent that occurred during the evening session on the first day of the election. (Tr. 440.) He saw the voter hand her ballot to the Board agent and then heard them strike up a conversation in Spanish. Marshall Tresaugue admitted that he does not understand Spanish; consequently, he did not know what the voter or the Board agent said. (Tr. 457.) Nevertheless,

Marshall Tresaugue testified that Board agent read the ballot to the voter because she could not read. (Tr. 458.) He testified that the voter could not read because his union observer counterpart told him so.¹⁶ (Tr. 458.) This fact alone is not the basis of the objection, however. Marshall Tresaugue further testified that because he was an alternate observer, he was in the polling room the following day before the polls opened. (Tr. 459-460.) While there, he recognized the purported illiterate voter in the polling room, who was there to serve as a union observer. (Tr. 459-460.) And relying solely on what his union counterpart had told him the previous day about this voter, Marshall Tresaugue voiced his concern to the Employer's attorney that one of the Petitioner's observer was illiterate. (Tr. 459.)

The identity of the purported illiterate observer remains unknown. The Employer did not call the union observer in question or that observer's Employer counterpart. The Employer did not present evidence this purported illiterate union observer engaged in any misconduct during the second day of the election. Moreover, there is no allegation or evidence that this purported illiterate union observer, or any observer for that matter, was unable to perform the duties of an observer.

B. Board Law and Recommendation

The record establishes that the Employer's objection rests solely on hearsay evidence and speculation. Because the evidence presented lacks any probative value, Employer Objection 12 is unsubstantiated and is, therefore, overruled.

VII. CONCLUSION

I recommend that the Employer's objections be overruled in their entirety.¹⁷ The Employer has failed to establish that its objections to the election held on November 8 and 9

¹⁶ In cross-examination, it was evident that Marshall Tresaugue could not testify about what the Board agent or the voter said because they conversed in Spanish. When asked if he was guessing that the Board agent read the ballot to the voter, Marshall Tresaugue confirmed that he based his assertion solely on hearsay, which lacks any probative value. (Tr. 458.) ("My union observer I worked with said she does not . . . know how to read . . . I got to base it on what I've been told.")

¹⁷ At the hearing, the Employer requested and submitted an offer of proof that I consider Petitioner's pre-petition conduct not only to decide the merits of the objections themselves but also to determine scope of the remedy should I recommend that the election be set aside. (ER Br. 5; ER RD Ltr. 1-6; Tr. 38-45.) I rejected the Employer's request and offer of proof finding that it was irrelevant to the objections set for hearing. In this regard, I granted the Petitioner's petition to revoke, in part, Employer's subpoena *duces tecum* no. B-1-Z1SXBX served on the Petitioner's Custodian of Records. (Tr. 38-45.) More specifically, I granted the Petitioner's petition to revoke subpoena request numbers 8-10, which collectively sought the production of the Petitioner's communications with third parties regarding Station Casinos since January 1, 2015 to the present. I did so finding that the information sought did not relate to the subject matters under investigation in this hearing. (Tr. 38-45.) Similarly, I declined to hear testimony from the Employer's Vice President of Operations for Station Casinos, whom, based on the Employer's offer of proof, would have testified to the Petitioner's pre-petition conduct for the purposes of determining the remedy in the event I decided to set aside the election. I declined to hear this testimony determining that the testimony did not relate to the subject matters under investigation in this hearing. (Tr. 676-680.) Because I

reasonably tended to interfere with employee free choice. Therefore, I recommend that an appropriate certification issue.

VIII. APPEAL PROCEDURE

Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region 27 by **February 23, 2018**. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Exceptions may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the exceptions should be addressed to the Regional Director, National Labor Relations Board, Byron G. Rogers Federal Building, 1961 Stout Street, Suite 13-103, Denver, CO 80294.

Pursuant to Sections 102.111 – 102.114 of the Board's Rules, exceptions and any supporting brief must be received by the Regional Director by close of business **5:00 p.m. Mountain Time** on the due date. If E-Filed, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than **11:59 p.m. Eastern Time** on the due date.

Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Dated: February 9, 2018

A handwritten signature in blue ink, appearing to read "José R. Rojas".

José R. Rojas
Hearing Officer

have overruled the Employer's objections in their entirety, there is no need to consider such evidence for the purposes presented by the Employer.

Exhibit G

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

**STATION GVR ACQUISITION, LLC D/B/A
GREEN VALLEY RANCH RESORT SPA CASINO**

Employer

and

Case 28-RC-208266

**LOCAL JOINT EXECUTIVE BOARD
OF LAS VEGAS AFFILIATED WITH
UNITE HERE INTERNATIONAL UNION**

Petitioner

**DECISION AND
CERTIFICATION OF REPRESENTATIVE**

Pursuant to a Stipulated Election Agreement, an election was conducted on November 8 and 9, 2017 in a unit of certain of the Employer's hotel, resort, and casino employees ("team members").¹ The tally of ballots showed that of the approximately 833 eligible voters, 571 cast ballots for the Local Joint Executive Board of Las Vegas Affiliated with United Here International Union ("Petitioner" or "Union"), and 156 cast ballots against representation. There were 3 challenged ballots. Therefore, Petitioner received a majority of the votes.

On November 14, 2017, the Employer timely filed twelve objections to conduct affecting the election. The Regional Director for Region 28 ordered that a hearing be conducted to give the parties an opportunity to present evidence regarding the objections. On November 30, 2017, the case was transferred to Region 27. Pursuant to Region 28's Order Directing Hearing on Objections, and subsequent Order Rescheduling hearing, a six-day hearing was conducted in December 2017 in Las Vegas, Nevada before a designated Hearing Officer from Region 27. On

¹ Including all regular full-time and regular part-time and regular on-call Banquet Bartenders, Banquet Porters, Banquet Servers, Bar/Beverage Porters, Bartenders, Bell Captains, Bell Persons, Beverage Servers, Bus Persons, Concession Workers, Catering Beverage Porters, Cooks, Cook's Helpers, Counter Attendants, Food Servers, Gourmet Hosts/Cashiers, Host/Cashiers, IM Porters, Kitchen Runners, Kitchen Workers, Lead Banquet Porters, Lead Counter Attendants, Lucky VIP Attendants, Lucky VIP Bartenders, Pantry Workers, Pantry Workers 11, Resort Guest Room Attendants, Resort Housepersons, Resort Steakhouse Cooks, Resort Suite Guest Room Attendants, Room Runners, Service Bartenders, Sprinters, Status Board Operators, Steakhouse Captains, Stove Persons, Sushi Cooks, Team Member Dining Room Attendants, Turndown Guest Room Attendants, Utility Porters, VIP Attendants, VIP Bartenders, VIP Lounge Bartenders, VIP Servers employed by the Employer at Green Valley Ranch Resort Spa Casino; but excluding all other employees, including all front-desk employees, valet parkers, gaming employees (dealers, slot attendants, cage cashiers), inspectresses, engineering and maintenance employees, office clerical employees, confidential employees, and all guards, managers and supervisors as defined by the Act.

February 9, 2018, the Hearing Officer issued his Report on Objections (Report) in which he recommended overruling the objections in their entirety.

The Employer timely filed thirty exceptions to the Hearing Officer's recommendations. In its exceptions, the Employer contends that the Hearing Officer erred by:

- 1) concluding that the Employer failed to meet its burden of establishing objectionable conduct which affected the results of the election (Report p. 2);
- 2) concluding that there was "no evidence that any of the committee leaders or other employees or individuals engaged in any misconduct at or near the polls." (Report p. 2);
- 3) concluding that the evidence failed to establish the employees knew or would reasonably believe that the Petitioner was keeping a list of who had voted (Report p. 2);
- 4) refusing to consider testimony concerning pre-petition conduct that gave "meaning and dimension" to the Petitioner's post-petition objectionable conduct. (Report p. 9, fn. 6);
- 5) concluding that the "Employer sought to litigate the showing of interest." (Report p. 9, fn. 6);
- 6) concluding that the record failed to establish that team members knew or reasonably believed that their responses to Committee Leaders regarding when they intended to vote would be shared with the Petitioner (Report p. 12.);
- 7) revoking the Employer's subpoena duces tecum seeking information that would have revealed the identity of Petitioner's Committee Leaders thereby denying the Employer due process. (Report p. 12, fn. 7);
- 8) concluding that the Petitioner's "get-out-the-vote campaign, including its use of sign-up sheets" was unobjectionable polling of sentiments (Report, p. 13);
- 9) giving dispositive weight to the Union's stated motive of its "get-out-the-vote" campaign and sign-up sheets, rather than considering the objective effect on unit employees;
- 10) concluding that the "get-out-the-vote campaign, coupled with its use of the sign-up sheets, amount to nothing more than non-coercive pre-election polling permitted under the Act" (Report p. 13-14);
- 11) disregarding the testimony of a witness that she was "told" to fill out the sign-up sheet. (Report p. 14, fn. 8);
- 12) overruling Employer's Objection 1 (Report p. 15);
- 13) crediting the testimony of an employee as to the circumstances under which she escorted employees to the polls (Report p. 17);
- 14) concluding that the individuals who "escorted" employees to the polls were not Petitioner's Organizers or Committee Leaders (Report p. 18);
- 15) failing to consider the "escorting" of employees to the polls in the context of the Petitioner's "campaign of surveillance and tracking of employees' voting activities" (Report p. 18);
- 16) overruling Employer's Objections Nos. 2-3 (Report p. 18);

- 17) concluding that the individuals “patrolling” the hallway were not Petitioner’s Organizers or Committee Leaders (Report p. 22);
- 18) failing to consider the “patrolling” in the context of Petitioner’s “campaign of surveillance and tracking of employees’ voting activities” (Report p. 22);
- 19) overruling Employer’s Objection 6 (Report p. 23);
- 20) concluding that there was no evidence presented that Committee Leaders or other employees knew the Petitioner was keeping track of who had voted (Report p. 24-25);
- 21) concluding that the Petitioner’s conduct would not create “reasonable belief among team members and committee leaders that the Petitioner was engaging in objectionable list-keeping or even keeping a list for that matter” (Report p. 25);
- 22) concluding that list-keeping is objectionable only near the polls (Report p. 25);
- 23) concluding that bargaining unit employees and Committee Leaders would have a reasonable belief that the purpose of the information was to engage in electioneering away from the polls (Report p. 26);
- 24) disregarding the testimony of two employees that they knew that fellow Committee Leaders were aware that the Petitioner was keeping a list of who had voted (Report p. 25-26);
- 25) focusing exclusively on whether employees would be aware of the Petitioner’s act of creating a list, rather than whether they would know or reasonably believe that the Petitioner was “monitoring and tracking” whether they had voted (Report p. 26);
- 26) failing to consider whether the “oral lists” of those who had voted and which were provided to the Petitioner were, themselves, objectionable “lists” (Report p. 26);
- 27) considering the Petitioner’s purported intent for seeking information about who had voted, rather than the objective impression it would create on employees (Report p. 26);
- 28) concluding that the Petitioner did not engage in objectionable list keeping and overruling Objection 8 (Report p. 26);
- 29) concluding that Petitioner’s questioning of employees on whether they had voted was not coercive or threatening because of failing to consider pre-petition conduct that gave context and meaning to the Petitioner’s questioning of employees about their voting (Report p. 26); and
- 30) concluding that the Objections should be overruled in their entirety (Report p. 33).

Petitioner timely filed exceptions to the hearing officer’s conclusion that the Committee Leaders were special agents of the Petitioner with respect to their role in the “get out the vote” efforts, including soliciting information as to if and when team members would vote or had voted, and that the Petitioner was therefore responsible for statements made by Committee Leaders in the course of those solicitations.

On March 12, 2018, both parties filed answering briefs in opposition to the other parties’ exceptions.

I. INTRODUCTION

I have reviewed the record *de novo* in light of the exceptions, briefs and answering briefs. I find that the Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. While the Employer has excepted to some of the hearing officer's credibility resolutions, the Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the reviewer that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). I have carefully examined the record and find no basis for reversing the Hearing Officer's credibility findings.

I have considered the evidence and the arguments presented by the parties and, as discussed below in detail, I agree with the Hearing Officer that all of the objections should be overruled. Accordingly, I am issuing a Certification of Representative.

II. SUBPOENA ISSUE

In Employer's Exception 7 to the Hearing Officer's report, the Employer asserts that the Hearing Officer erred in granting petition to revoke Item 1 of subpoena *duces tecum* (B-1-Z1SXBX), thereby denying it due process. Specifically, the Employer argues that the hearing officer's ruling precluded it from identifying the in-plant organizing committee members identified as "Committee Leaders," thereby prejudicing its ability to make a full inquiry into their election-day conduct, including whether they had engaged in any of the unlawful patrolling or other alleged objectionable activity.

I find no basis for reversing the Hearing Officer's subpoena ruling. While the Employer asserts in its brief in support of its exceptions that the sign-up sheets would have aided it in identifying the employee Committee Leaders in order to identify "patrollers" as agents of the Petitioner (Objection 6), such a list of names would have been of little use to support the testimony of witnesses who did not know the names of individuals who were purportedly seen "patrolling" at or near the polling area. The record indicated that there was a substantial number of such employee Committee Leaders. Insofar as the need for the sign-up sheets related to Objection 6, it would not have been warranted, based on the limited evidence presented in support of that objection, to call each such employee to testify about their whereabouts during the election. Moreover, to the extent that the sign-up sheets relate to other objections, the record contains exemplars of these documents, and Employer had opportunity to examine Committee Leaders about the instructions they received about them, and what they did with them, and also examined team member witnesses about their interactions and conversations with respect to these documents. Further, the Employer was able to examine the Petitioner's Vice President Kevin Kline regarding the creation, uses, and scope of the sign-in sheets generally.

In the absence of an offer of proof or record evidence that employees identified as Committee Leaders were engaged in specific objectionable conduct, let alone on the Union's behalf, I agree with the ruling that the Employer failed to show a need to identify all employees engaged in protected organizing activities as Committee Leaders. Importantly, the record

establishes that the subpoenaed sign-up sheets also contain the names of employees who had signed union authorization cards, and whose confidentiality interests were also at stake. Therefore, I agree with, and affirm, the Hearing Officer's determination that in these circumstances the employees' "paramount" confidentiality interests in the Section 7 activities reflected on the subpoenaed documents outweigh the Employer's purported need for those documents to identify Committee Leaders. *National Telephone Directory Corp.*, 319 NLRB 420, 421-22 (1995). See also, *Trump Ruffin Commercial, LLC*, 2016 WL 4036983 (July 28, 2016) (unpublished) (Board affirmed hearing officer's ruling revoking subpoena request for "any and all photographs or records" because the materials "could expose employee conduct protected by Section 7 of the Act that the Employer could not lawfully have photographed itself" and were "not probative of the Employer's specific objections to the election.") Accordingly, I affirm the Hearing Officer's rulings relating to the subpoena *duces tecum* (B-1-Z1SXBX).

III. THE OBJECTIONS

Employer's Objections 4, 5, 7, and 9-12

The Hearing Officer recommended overruling Objections 4, 5, 7, and 9-12 in their entirety. In the absence of any exceptions to any of those findings by either party, I adopt *pro forma*, the Hearing Officer's recommendations to overrule these seven objections.

Employer's Objection 1

[Petitioner] prepared "Election Day Sign Up Sheets" containing names and contact information taken from the list of eligible voters; distributed the Sheets to its agents; and instructed the agents to direct bargaining unit employees that they must "sign up" to vote on a specified date and time, and that they must vote "Yes" for the Union. This interfered with employees' rights to refrain from voting, was intimidating and coercive, destroyed the requirement that their vote be in-secret, voluntary, or anonymous, and demonstrated that the Union was monitoring when they voted.

As to this objection, the evidence established that during the critical period preceding the election, the Petitioner created and made use of "Election Day Sign Up" sheets. These contained a list of names and contact information of employees the Petitioner had determined were likely to vote for the union opposite a grid with the polling dates and times. And as the Hearing Officer's Report details, the evidence further shows that Committee Leaders did, at the Petitioner's instruction, ask team members on sheets assigned to them whether and when they intended to vote, and reported this information to union organizers to some extent. The record revealed no evidence of threats, promises, misrepresentations, or other coercive statements made by Committee Leaders in the course of these conversations with team members. The Hearing Officer found that these sign-up sheets amounted to non-coercive and lawful pre-election polling by Petitioner. The Hearing Officer found no evidence that team members were told that they "must sign up to vote" or that they "must vote 'yes'" in the election.

Petitioner's Exceptions

In its exceptions, the Petitioner contends that the Hearing Officer erred in finding that the Committee Leaders should be deemed special agents of the Petitioner for the purposes of soliciting the information as to whether and when team members intended to vote, or had voted. The Petitioner therefore takes further exception to being “deemed responsible for representations or statements made when its committee leaders asked team members on their respective sign-up sheets when they intended to vote or whether they had voted” under the standard of *Davlan Eng’g, Inc.*, 283 NLRB 803 (1987). (Report p. 13.) However, the Hearing Officer ultimately found no unlawful representations or statements by Committee Leaders engaged in soliciting employees about their intentions to vote.

The record and Board law cited by the Hearing Officer support his conclusion that Committee Leaders were special agents of the Petitioner for the purposes of polling team members regarding whether or when they intended to vote, and to report that information back to the Petitioner, using the sign-up sheets created by the Petitioner for that purpose. But as the Hearing Officer found, and I affirmed, committee leaders made no objectionable statements in the course of that conduct. Therefore, I do not need to rely on the Hearing Officer’s statements regarding the *potential* scope of the Petitioner’s vicarious liability for Committee Leaders’ statements and representations, or determine whether *Davlan* presents the proper standard for such evaluation. *Id.* Nor do I need to determine whether any such statements were “in furtherance of the principal’s interest and within the general scope of authority” under more general agency principles. *Pratt (Corrugated Logistics)*, 360 NLRB 304, 304 (2014) (cited by the Employer). Therefore, I affirm the Hearing Officer’s findings and adopt his recommendation overruling Employer’s Objection 1 without passing on the Hearing Officer’s reliance on *Davlan*.

Employer’s Exceptions

In its exceptions to the Hearing Officer’s findings in connection with Objection 1 (Exceptions 1, 4-6, 8-12 and 30²), the Employer asserts that the above activities amounted to impermissible list-keeping and monitoring of employees that had the tendency to create the coercive impression among voters that they were required to vote, and that the Petitioner was monitoring whether they did.

In Exceptions 4 and 5, the Employer challenges the Hearing Officer’s limitation of a witness’ testimony regarding alleged pre-petition misconduct including coercion in card solicitation. The Hearing Officer viewed this primarily as an untimely attempt to litigate the showing of interest and precluded extensive questioning on that issue as being beyond the scope of the objections and issues set for hearing. The Employer is correct that unlawful pre-petition misconduct may be considered in order to give “meaning and dimension” to ambiguous post-petition conduct, *Dresser Indus.*, 242 NLRB 74, 74 (1979), or where it is “sufficiently serious to have affected the results of the election.” *Harborside Healthcare*, 343 NLRB 906 (2004). I have carefully reviewed the Hearing Officer’s ruling as well as the Employer’s offer of proof on the record and the witness testimony in question. I find the testimony and offer of proof regarding pre-petition card solicitation involved conduct that was not sufficiently related to

² The Employer’s Exception 30 is a “catch-all” exception to the Hearing Officer’s recommendation to overrule all of the Objections in their entirety.

objectionable conduct occurring within the critical period, to have had an ongoing impact on the election. Therefore, the Hearing Officer properly limited the scope of testimony to factual issues reasonably related to those objections set for hearing in the Notice of Hearing. *See Precision Products Corp.*, 319 NLRB 640, 641 (1995) (hearing officer lacked authority to consider an objection that had been withdrawn and that was therefore not “reasonably encompassed within the scope of the objections”); *Iowa Lamb Corp.*, 275 NLRB 185 (1985) (hearing officer erred by considering statements and issues “wholly unrelated” to the issues set for hearing).

The Employer asserts in Exception 11 that the Hearing Officer erred in disregarding testimony by an employee that she was “told” to identify the date and time she was going to vote, and also “told” to text another team member to find out if they were going to vote. The Employer regards this as evidence that the Committee Leaders coerced employees, including this employee, into providing this information, and created the impression that the Petitioner was monitoring their voting. Contrary to the Employer’s assertions, the Hearing Officer did not disregard this testimony. Rather, he discussed it at some length (Report p.14, fn. 8), taking into account the brevity of the encounter, the witness’ demeanor in recounting it, and issues with translation. He found that, unaccompanied by any threats of reprisal, the witness’ conclusory choice of the word “told,” standing alone, was insufficient to support a finding that the Committee Leader obtained information from her through coercion. I find no basis to reverse the Hearing Officer on this point.

The balance of the Employer’s Exceptions regarding the sign-up sheets, (Exceptions 6, 8-10, and 12) pertain to the Hearing Officer’s findings that the Petitioner’s use of the sign-up sheets in its “get out the vote” activities amounted to permissible pre-election polling by a labor organization. The Employer contends that gathering such information amounted to harassment of employees that interfered with employees’ free choice in whether and when to vote. I will address issues relating to keeping track of who had voted below in connection with Objection 8. But as to the allegations of harassment and coercion in connection with the pre-election sign-up sheets, the record and Board law cited by the Hearing Officer support his conclusion that this conduct amounted to permissible pre-election polling of employees to determine the level of support the Petitioner enjoyed. *J.C. Penny Food Dept.*, 195 NLRB 921, 921 fn. 4 (1972) (union polling of eligible voters regarding how they would vote was not objectionable). In this connection, Board law supports his determination that the fact that responses were documented and reported to Petitioner to aid in its campaign does not render the polling coercive or unlawful. *Springfield Hosp.*, 281 NLRB 643, 692-693 (1986) (pro-union employees discussed the union with other employees and then marked charts maintained by the union reflecting extent of support). And, as the Hearing Officer accurately pointed out, even if Committee Leaders were “persistent,” as described in the testimony of two employee witnesses, otherwise lawful solicitation does not become coercive just because “it annoys or disturbs the employees who are being solicited.” *Ryder Truck Rental, Inc.*, 341 NLRB 761, 761 (2004). Thus, unaccompanied by any evidence of threats of reprisal, deception, or other circumstances rendering such questions coercive, I agree with the Hearing Officer that this objection is unsubstantiated.

Thus, having reviewed the record, the Employer’s Exceptions and supporting Brief, and Petitioner’s Brief in Opposition to Employer’s Exceptions, I have decided to affirm the rulings

made by the Hearing Officer and to adopt his recommendation to overrule the Employer's Objection 1.

Employer's Objection 2

[Petitioner's] agents escorted groups of eligible voters to the voting room, interfering with their right to choose to refrain from voting, was intimidating and coercive, destroyed the requirement that their vote be in-secret, voluntary, and anonymous, and demonstrated that the union was monitoring whether they voted.

Employer's Objection 3

[Petitioner's] agents escorted voters to the voting room one-at-a-time, and departed only after the voter entered the voting room, interfering with their right to choose to refrain from voting, was intimidating and coercive, destroyed the requirement that their vote be in-secret, voluntary and anonymous, and demonstrated that the Union was monitoring whether they had voted.

As to these two related objections, the record evidence established that election observers saw a number of unidentified individuals (some wearing union buttons) arrive with one or more voters to the doors of the polling location. Some of these individuals indicated to the voters that this was where the polling area was, or directed them inside, and then left. Others remained at the location for a time, either entering to vote themselves, or waiting outside while the other team member voted. The two Committee Leaders who testified said that they walked to the polling location with another voter after being released by the chef at the same time to vote. One of the Committee Leaders also walked one voter to the polls after she was asked where the polling room was. The evidence did not reflect that any of these "escorts" engaged in any other conduct, such as holding signs, writing anything down, or talking near the polls. Further, the evidence did not reflect that the Petitioner instructed any team members or committee leaders to escort voters to the polling location. However, the evidence did reflect that on some occasions the individuals left when Board agents directed them to leave.

Employer's Exceptions

The Employer's Exception 13 challenges the Hearing Officer's findings crediting a Committee Leader's testimony that she walked an employee to the polls because she happened to be nearby and another team member asked her where the voting room was. I have reviewed the record and find no basis for overruling the Hearing Officer's credibility finding under the standard set forth in *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957).

The Employer's Exception 14 challenges the Hearing Officer's finding that the record did not establish that "escorts" were Union organizers or Committee Leaders. Having reviewed the record and the Hearing Officer's report, I find that he did not err in this regard. He accurately noted that none of the election observers or other witnesses could identify the alleged "escorts" they described in their testimony as Committee Leaders. And he found that two Committee Leaders each walked with one other team member when they went to vote, and that one of these

Committee Leaders also walked with a team member to the polling location when the team member asked where the polls were located. Ultimately, however, the Hearing Officer found that the Employer failed to prove that any of the above conduct was attributable to the Petitioner. The Hearing Officer found that Committee Leaders were not general agents of the Petitioner, and no party took exceptions to that finding, which I affirm. Further, there was no record evidence that the Petitioner instructed Committee Leaders, to escort voters to the polls on election day.

The Employer's Exceptions 15 and 16 challenges the Hearing Officer's overall evaluation of the effect of the challenged conduct and subsequent recommendation overruling of the objections. The record and Board law cited by the Hearing Officer supports his conclusion that, even assuming "escorts" were Committee Leaders, this conduct as described in the record would not rise to the level of objectionable election interference by a third-party absent any evidence of threats or other coercion indicating that employees were being escorted involuntarily or pressured to vote. I would note further that observers testified to an absence of any electioneering (sign-holding, distribution of literature, chanting, etc.) or list keeping (e.g. writing notes or holding lists) by these purported "escorts."³

Thus, having reviewed the record, the Employer's Exceptions and supporting Brief, and Petitioner's Brief in Opposition to Employer's Exceptions, I have decided to affirm the rulings made by the Hearing Officer, for the reasons set forth in his report, and to adopt his recommendation to overrule the Employer's Objections 2 and 3.

Employer's Objection 6

[Petitioner's] agents patrolled the hall immediately adjacent to the voting room in the "no electioneering" area and frequently looked inside, maintaining an intimidating physical presence around the voting room and demonstrating that the Union was monitoring who had voted in the election, was intimidating and coercive, destroyed the requirement that the vote be in-secret, voluntary, or anonymous, and demonstrated that the Union was monitoring whether they voted. This happened on multiple occasions; on at least one occasion a Board agent exited the voting room as the individual quickly departed the "no electioneering" area ahead of the Board agent; and on at least one other

³ In its Brief in Support of Employer's Exceptions, the Employer apparently combined discussion of Objections 2 and 3, which relate to "escorting" of voters, with Objection 6, which relates to "patrolling" and electioneering, but only referred to Objection 6 in the heading. (Exceptions Br. 12-13). In connection with Objections 2 and 3, the Employer contends in the supporting brief that Board agents repeatedly directed purported escorts to leave the "no electioneering" area during the two days of voting, and that an adverse inference should be drawn by the fact that the Region did not call Board agents to testify in this regard (Exceptions Br. 13, fn. 8). Prior to the hearing, the Employer had requested that, pursuant to Section 102.118 of the Board's Rules and Regulations, three Board agents be allowed to testify about activities at or near the polling place. By letter dated November 28, 2017, an Associate to the General Counsel stated that Counsel for the Region may present Board agents to testify if the Hearing Officer deemed it necessary. Such witnesses were not called by Counsel for the Region, and no adverse inference may be drawn in these circumstances where the Board agents were not uniquely in possession of facts that would require their testimony. The case cited by the Employer, *Leeward Nursing Home*, 278 NLRB 1058, 1084 (1986), is distinguishable in that Counsel for the General Counsel in that unfair labor practice proceeding bore the burden and was uniquely in possession of facts that would arguably have supported the Region's case. Such circumstances are not present here.

occasion a Board agent confronted an individual and directed the individual to depart from the “no electioneering” area.

The Hearing Officer found that the record evidence of this alleged surveillance and intimidation amounted to evidence that some team members walked “to and fro” in the hallway outside of the voting room, “and in doing so, looked inside.” However, he noted that “no single individual “maintained a continued presence in or near the polling area or engaged in any conduct other than looking inside the room as they walked by.” Further, the Hearing Officer found that the record failed to establish the identity of alleged “patrollers,” or their union sentiments, let alone prove that they were Committee Leaders or Union agents. Regardless, whether or not the conduct could be attributed to Committee Leaders, he found that the Employer had failed to prove either an “atmosphere of fear and reprisal” or unlawful Union surveillance of the polls, and recommended that the objection be overruled.

Employer’s Exceptions

The Employer’s Exception 17 challenges the Hearing Officer’s factual finding that individuals “patrolling” the hallway were not Union organizers or Committee Leaders. This challenge is based on the presumption that if the Employer had been able to identify Committee Leaders through the production of Item 1 in the quashed subpoena *duces tecum*, it might have discovered that the patrolling employees were, in fact, Committee Leaders. Having affirmed the Hearing Officer’s ruling as to that subpoena request for the reasons discussed above, I find no basis to overrule the Hearing Officer based on speculation as to what that subpoena may have uncovered. The record reflects no evidence identifying “patrollers” as individuals wearing any union paraphernalia, or otherwise tending to support the Employer’s speculation that employees walking through the hallway adjacent to the polling were there as Committee Leaders, or on the Petitioner’s behalf. In any event, the Hearing Officer found that even assuming *arguendo* that the patrollers were Committee Leaders, the conduct presented in the record would not have risen to the level of coercive and objectionable surveillance of the polling area, under either the standard for third-party conduct or the standard for party conduct.

The Employer’s Exceptions 18 and 19 challenge the Hearing Officer’s overall evaluation of the effect of the challenged conduct and subsequent recommendation overruling of the objection, urging the Regional Director to consider the “totality” of Petitioner’s conduct rather than considering the objections in isolation. The cases cited by the Employer in its exceptions (ER Exceptions Br. 11-12) are inapposite in that they involve patrolling and surveillance attributable to a party. *Int’l Marketplace, Inc.*, 1997 WL 33316029 (Apr. 7, 1997). Here, the Hearing Officer found no evidence identifying the alleged “patrollers” as pro-union employees, let alone Committee Leaders or union organizers. Further, having reviewed the record and Board law, including the cases cited by the Hearing Officer, I find no basis to overrule the Hearing Officer’s finding that the conduct described by witnesses (individuals walking by the voting room and looking inside) would not create a general atmosphere of fear and reprisal rendering a free election impossible or prove Petitioner’s agents surveilled the polling, even if some of the individuals who “looked inside the room” were Committee Leaders.

Further, the cases cited by the Employer regarding “totality of circumstances” involved incidents that, although isolated, were serious and independently constituted objectionable conduct, the cumulative effect of which demanded setting aside election. *See NLRB v. Monark Boat Co.*, 713 F.2d 355, 360 (8th Cir. 1983) (union supporters alleged to have threatened physical harm, threatened and engaged in property damage, and poisoned someone’s dog); *Mercy-Memorial Hosp.*, 334 NLRB 100 (2001) (including instances of objectionable surveillance, threats of loss of benefits, and interrogation). Here, we are presented with several instances of unobjectionable conduct. And the cumulative effect of individually unobjectionable conduct is likewise unobjectionable.

Thus, having reviewed the record, the Employer’s Exceptions and supporting Brief, and Petitioner’s Brief in Opposition to Employer’s Exceptions, I have decided to affirm the rulings made by the Hearing Officer, for the reasons set forth in his report, and to adopt his recommendation to overrule the Employer’s Objection 6.

Employer’s Objection 8

[Petitioner’s] agents maintained a list of who had voted, thereby interfering with employees’ rights to refrain from voting, was intimidating and coercive, destroyed the requirement that their vote be in secret, voluntary, or anonymous, demonstrated the Union was monitoring whether they voted, and related an intimidating and coercive atmosphere.

The evidence showed that during the election, Committee Leaders did observe and make some verbal reports to Petitioner’s organizers that certain team members had voted, or at least told Committee Leaders that they voted. The evidence further showed that Committee Leaders told the Petitioner what they had learned and that the Petitioner electronically recorded the information. Petitioner used the information to determine which of their likely supporters had not yet voted, and then directed “get out the vote” efforts toward those voters, including calling them to remind them to vote. The record does not establish that either Committee Leaders or other team members knew whether, how, or why the Petitioner was collecting, recording, or using the information. Moreover, there is no evidence that sign-up sheets were in circulation on the days of the election, or that any lists of who had voted were made or maintained by Committee Leaders, pro-union employees, or Union organizers anywhere near the polls. The Hearing Officer found, therefore, that the above conduct did not amount to any objectionable list keeping at or near the polls.

Employer’s Exceptions

The Employer’s Exceptions 1, 4, 5, 7-10, and 20-30 to the Hearing Officer’s findings on Objection 8 primarily take issue with his factual finding that team members were unaware, and would not reasonably infer from the circumstances, that that Petitioner was keeping track of who was voting. I have reviewed the record and the cases cited by the Hearing Officer and find no basis to overturn his findings. The Hearing Officer correctly cited and relied upon the standard, established by longstanding Board law, that list-keeping is coercive and objectionable “when it can be shown or inferred from the circumstances that the employees knew that their names were

being recorded.” *Days Inn Mgmt. Co.*, 299 NLRB 735, 737 (1992). The Employer has cited no case inconsistent with that standard. The record in this case contains no evidence that a single voter was actually aware of the electronic list being maintained by the Petitioner.

Further, no circumstances were present that would reasonably alert employees that their voting was being tracked. There was no list-making behavior in physical proximity to the polls, no voters were present when Committee Leaders reported information to the Petitioner, and no witnesses testified to seeing or hearing about lists or note-taking in connection with voting. No employees testified to hearing or seeing any indications of list-keeping by any party. Even the Committee Leaders who were reporting their observations of who had voted testified they did not know what the Petitioner was doing with the information and heard nothing of anyone keeping a list. (Tr. 290-91; 613.) Employer, in Exception 24, asserts that the Hearing Officer disregarded testimony from Committee Leaders that they knew the Petitioner was keeping a list of team members who had voted. However the cited testimony only indicates that they knew other Committee Leaders had sign-up sheets involved in the pre-election polling that was the subject of Objection 1, and which were not used on election day. (Tr. 295-97; 613-14.)

The Employer, in its Exceptions also asserts that the Hearing Officer erred in concluding that list-keeping is only objectionable near the polls (Exception 22), focusing “exclusively” on whether employees were aware of the “ministerial act” of list keeping (Exception 25), failing to consider whether “oral lists” were objectionable (Exception 26), and considering the “purported intent behind seeking information...rather than the objective impression it would create” (Exception 27). I find no such errors in the Hearing Officer’s report, and instead find that he considered all overt conduct and circumstances from which employees could possibly infer that the Petitioner was maintaining a list of who had voted. Further, I note that the Employer has cited no Board case, and I am aware of none, where employees reasonably inferred list keeping away from the polls based exclusively on being asked by a co-worker if they had voted, which is all the evidence here establishes. *C.f. Medical Ctr. Of Beaver County, Inc.*, 716 F.3d 995 (3d Cir. 1983) (committee members stood by the employee entrance of hospital checking off names with a clipboard and making audible comments including “did you get that one, has she voted, do you know if we’ve gotten her” etc.) Finally, the Hearing Officer appropriately determined not to consider pre-petition conduct when he found that the questioning of employees about whether they had voted was not coercive or threatening (Exception 29). As stated above, the testimony and offer of proof concerning pre-petition conduct was not sufficiently related to alleged objectionable conduct occurring within the critical period. I further affirm the Hearing Officer’s finding that based on the record such conduct by employees did not rise to the level of coercive or threatening conduct. Therefore, I find no basis to reverse the Hearing Officer’s finding that the Employer failed to show that team members or committee leaders knew, or reasonably would infer from the circumstances, that the Petitioner was maintaining a list of who had voted.⁴

⁴ I do not need to rely on the Hearing Officer’s finding that employees reasonably believed the Petitioner was actually engaged in permissible electioneering instead of list keeping, as that finding is extraneous to the analysis (Exception 23).

Thus, having reviewed the record, the Employer's Exceptions and supporting Brief, and Petitioner's Brief in Opposition to Employer's Exceptions, I have decided to affirm the rulings made by the Hearing Officer, for the reasons set forth in his report, and to adopt his recommendation to overrule the Employer's Objection 8.

IV. CONCLUSION

Based on the above and having carefully reviewed the entire record, the Hearing Officer's report and recommendations, and the exceptions and arguments made by the Employer and Petitioner, I overrule the objections, and I shall certify the Petitioner as the representative of the appropriate bargaining unit.

V. CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for the **Local Joint Executive Board of Las Vegas, affiliated with UNITE HERE International Union**, and that it is the exclusive representative of all the employees in the following bargaining unit:

INCLUDED: All regular full-time and regular part-time and regular on-call Banquet Bartenders, Banquet Porters, Banquet Servers, Bar/Beverage Porters, Bartenders, Bell Captains, Bell Persons, Beverage Servers, Bus Persons, Concession Workers, Catering Beverage Porters, Cooks, Cook's Helpers, Counter Attendants, Food Servers, Gourmet Hosts/Cashiers, Host/Cashiers, IM Porters, Kitchen Runners, Kitchen Workers, Lead Banquet Porters, Lead Counter Attendants, Lucky VIP Attendants, Lucky VIP Bartenders, Pantry Workers, Pantry Workers 11, Resort Guest Room Attendants, Resort Housepersons, Resort Steakhouse Cooks, Resort Suite Guest Room Attendants, Room Runners, Service Bartenders, Sprinters, Status Board Operators, Steakhouse Captains, Stove Persons, Sushi Cooks, Team Member Dining Room Attendants, Turndown Guest Room Attendants, Utility Porters, VIP Attendants, VIP Bartenders, VIP Lounge Bartenders, VIP Servers employed by the Employer at Green Valley Ranch Resort Spa Casino.

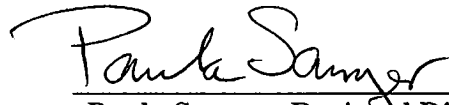
EXCLUDED: All other employees, including all front-desk employees, valet parkers, gaming employees (dealers, slot attendants, cage cashiers), inspectresses, engineering and maintenance employees, office clerical employees, confidential employees, and all guards, managers and supervisors as defined by the Act.

VI. REQUEST FOR REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by April 6, 2018. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: March 23, 2018



Paula Sawyer, Regional Director
National Labor Relations Board
Region 27